

REPORTS
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PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSOURI

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Kevin Kelly

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PREFACE

This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning February 1, 2001 through November 30, 2001. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 1978, as amended.

The syllabi or headnotes appended to the Reports and Orders are not a part of the findings and conclusions of the Commission, but are prepared for the purpose of facilitating reference to the opinions. In preparing the various syllabi for a particular case an effort has been made to include therein every point taken by the Commission essential to the decision.

The *Digest of Reports* found at the end of this volume has been prepared to assist in the finding of cases. Each of the syllabi found at the beginning of the cases has been catalogued under specific topics which in turn have been classified under more general topics. Case citations, including page numbers, follow each syllabi contained in the Digest.

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ORGANIZATION OF THE PUBLIC SERVICE COMMISSION

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ROBERT M. CLAYTON III

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Resigned May 3, 2001

ROBERT SCHEMENAUER

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Brian Kinkade, Executive Director

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Robert J. Quinn, Jr., Executive Director

Appointed September 12, 2001

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ORGANIZATION

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BILL HOPKINS Senior R.L.J.	MORRIS WOODRUFF Senior R.L.J.
VICKY RUTH Senior R.L.J.	KENNARD JONES R.L.J.
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UTILITY OPERATIONS DIVISION

WESS HENDERSON
DIRECTOR

UTILITY SERVICES DIVISION

BOB SCHALLENBERG
DIRECTOR

ADMINISTRATION DIVISION

DONNA PRENGER
DIRECTOR

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TO-2001-633	American Fiber Systems, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved)	7/3/01
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TA-2001-699	Big River Telephone Company, LLC (Certificate of service authority, basic local, local exchange and IXC services, granted)	8/13/01
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TA-2001-346	Charter Fiberlink-Missouri LLC (Certificate of service authority, basic local and IXC services, granted)	4/5/01
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TA-2000-829	Cypress Communications Operating Company, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted)	2/15/01

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TD-2002-25	Digital Access Corporation of Missouri, Inc. (Certificate of service authority, basic local, local exchange and IXC services, canceled)	8/10/01
TD-2001-392	Digital Broadcast Network Corporation (Certificate of service authority, local exchange and IXC, canceled)	7/31/01
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TO-2001-442	DSLnet Communications, LLC (Interconnection agreement with Southwestern Bell Telephone Company, granted)	4/10/01

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TD-2001-682	Efficacy Group, Inc. (Certificate of service authority, IXC, canceled)	6/20/01
TA-2001-483	El Paso Networks, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	5/3/01
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TD-2001-698	Enterprise Telecom Services, Inc. (Certificate of service authority, IXC, canceled)	7/13/01
TO-2001-522	Epoch Networks, Inc., f/k/a HLC-Internet, Inc. (Certificate of service authority, IXC, canceled)	4/10/01
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TA-2001-351	Essex Communications, Inc. d/b/a eLEC Communications (Certificate of service authority, basic local telecommunications services, granted)	9/11/01
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TA-2001-418	eVoice Telecom, Inc. (Certificate of service authority, IXC, granted)	3/2/01
TA-2001-419	eVoice Telecom, Inc. (Certificate of service authority, basic local telecommunications services, granted)	4/3/01
TD-2002-6	eVoice Telecom, Inc. (Certificate of service authority, basic local and IXC, canceled)	7/31/01

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TA-2002-122	Fidelity Communication Services I, Inc. (Designation as an eligible carrier pursuant to Section 254 of the Telecommunications Act of 1996, granted)	11/6/01
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TD-2002-115	Firstworld Communications, Inc. (Certificate of service authority, IXC, canceled)	8/31/01
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TO-2001-349	Gabriel Communications of Missouri, Inc. (Notice of adoption of interconnection agreement with GTE Midwest Incorporated, order recognizing adoption)	2/8/01
TO-2001-500	Gabriel Communications of Missouri, Inc. (Name change to NuVox Communications of Missouri, Inc., recognized)	4/6/01
TO-2001-407	Gateway Technologies, Inc. (Name change to T-NETIX Telecommunications Services, Inc., recognized)	2/13/01
TM-2001-577	GE Capital Communication Services Corporation and GE Capital Telemanagement Services Corporation (Order approving transfer of assets)	5/7/01
TD-2001-637	GE Capital Communications Services Corporation (Certificate of service authority, basic local telecommunications services, canceled)	5/30/01
TA-2001-658	Global Crest Communications, Inc. (Certificate of service authority, IXC, granted)	6/28/01
TO-2001-460	Global Crossing Local Services, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved)	3/29/01
TD-2001-680	Global Telemedia International, Inc. (Certificate of service authority, IXC, canceled)	6/22/01
TD-2002-107	Global Telephone Corporation (Certificate of service authority, IXC, canceled)	9/13/01
TA-2001-507	GoBeam Services, Inc. (Certificate of service authority, resold and facilities-based basic local telecommunications services, granted)	6/7/01
TA-2001-506	GoBeam Services, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	6/21/01
TA-2001-717	Grand River Mutual Telephone Corporation d/b/a Lathrop Long Distance (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	8/9/01
TA-2001-716	Grand River Mutual Telephone Corporation d/b/a Grand River Long Distance (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	8/9/01
TO-2002-147	Grand River Mutual Telephone Corporation (Wireless interconnection agreement with ALLTEL Communications, Inc., approved)	10/16/01
GR-2001-36	Greeley Gas Company (1999-2000 Actual Cost Adjustment case)	7/3/01
TO-2001-371	GTE Midwest Inc., d/b/a Verizon Midwest (Interconnection agreement with Preferred Carrier Services, Inc., approved)	2/7/01
TO-2001-588	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with Phone-Link, Inc., approved)	5/29/01

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TO-2001-589	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with Direct2Internet Corporation, approved)	5/29/01
TO-2001-587	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with Payroll Advance, Inc., approved)	5/29/01
TO-2001-618	GTE Midwest Incorporated d/b/a Verizon Midwest (Amendment to interconnection agreement with Verizon Advanced Data Inc., approved)	6/19/01
TO-2001-639	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with Metrocall, Inc., approved)	6/19/01
TO-2001-689	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with DSLnet Communications, LLC, approved)	7/23/01
TO-2001-704	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with Z-Tel Communications, Inc., approved)	8/7/01
TO-2002-15	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with Local Line America, Inc., approved)	8/20/01
TO-2002-16	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with Missouri Network Alliance, LLC, approved)	8/20/01
TO-2002-69	GTE Midwest Incorporated d/b/a Verizon (Interconnection agreement with 1-800-Reconex, Inc., approved)	9/14/01
TO-2002-135	GTE Midwest Incorporated d/b/a Verizon Midwest (Interconnection agreement with Charter Fiberlink-Missouri, LLC, approved)	10/26/01
TO-2002-141	GTE Midwest Incorporated d/b/a Verizon Midwest (Notice of adoption of interconnection agreement, American Fiber Network, Inc., recognized)	10/30/01
TO-2002-166	GTE Midwest Incorporated d/b/a Verizon Midwest (Resale agreement with Preferred Carrier Services, Inc. d/b/a Phones for All and Telephonos Para Todos, approved)	11/26/01
TO-2002-201	GTE Midwest Incorporated, d/b/a Verizon Midwest (Interconnection agreement with Ciera Network Systems, Inc., approved)	11/28/01
TO-2002-205	GTE Midwest Incorporated, d/b/a Verizon Midwest (Interconnection agreement with NOW Communications, Inc., approved)	11/28/01

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TA-2002-191	Harness, Ruby A. d/b/a Antel Communications (Certificate of service authority, pay phones, granted)	11/7/01
TD-2002-56	Hertz Technologies, Inc. (Certificate of service authority, resold IXC, canceled)	10/2/01
TD-2002-18	Holthaus, Thomas G. (Certificate of service authority, pay phones, canceled)	7/25/01
TA-2002-149	Horn, Zachary (Certificate of service authority, payphones, granted)	10/24/01

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TD-2002-23	Host Network, Inc. (Certificate of service authority, IXC, canceled)	7/25/01
TD-2002-101	Hospitality Communications Corporation (Certificate of service authority, IXC, canceled)	9/13/01
TD-2001-621	Hotel Connect Management, Inc. (Certificate of service authority, IXC, canceled)	6/12/01
— I —		
TO-2002-170	IG2, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved)	11/14/01
TD-2001-643	Indiana Telcom Corporation (Certificate of service authority, pay phone, canceled)	5/23/01
TD-2001-496	International Discount Telecommunications Corporation (Certificate of service authority, IXC, canceled)	3/26/01
— J —		
TD-2002-99	JD Services, Inc. d/b/a American Freedom Network (Certificate of service authority, IXC and nonswitched local telecommunications services, canceled)	8/23/01
TD-2002-123	Joerling, Todd R. (Certificate of service authority, pay phones, canceled)	9/13/01
— K —		
EE-2001-663	Kansas City Power & Light (Variance regarding the Commission's separate metering requirement, granted) ...	7/10/01
EE-2002-32	Kansas City Power & Light (Variance from separate meter requirement, granted)	8/16/01
TA-2002-195	Keen LD, Inc. (Certificate of service authority, IXC, granted)	11/21/01
TD-2001-660	King, Dennis (Certificate of service authority, pay phones, canceled)	6/12/01
TF-2001-381	Kingdom Telephone Company (Order approving financing, granted)	3/27/01
TA-2001-595	KMC DATA LLC (Certificate of service authority, IXC, granted)	6/5/01
TA-2001-594	KMC Data, L.L.C. (Certificate of service authority, resold and facilities-based basic local telecommunications services, granted)	6/6/01
TO-2002-148	KMC Telecom V, Inc. (Order recognizing adoption of terms of an interconnection agreement between Verizon and U.S. Dial Tone, L.P.)	11/15/01
— L —		
TM-2001-700	LDD, Inc. (Sale of assets and subscribers to Big River Telephone Company, LLC, granted)	8/13/01
TD-2001-625	Lepper, Jim d/b/a Blue-Line Payphone (Certificate of service authority, pay phones, canceled)	6/13/01

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TA-2001-502	Le-Ru Long Distance Company (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	4/25/01
TO-2002-179	Level 3 Communications, LLC (Interconnection agreement with Southwestern Bell Telephone Company, approved)	11/21/01
TO-2002-138	Local Line America, Inc. (Resale agreement with ALLTEL Missouri, Inc., approved)	10/30/01
TA-2002-139	Local Line America, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted)	11/28/01
TD-2001-713	Local Long Distance, Inc. (Certificate of service authority, IXC, canceled)	7/12/01
TA-2001-659	Local Telecom Holdings, LLC d/b/a Transpoint Communications (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	6/28/01
TA-2001-598	Lock, Loretta A. d/b/a Branson Stagecoach RV Park (Certificate of service authority, pay phones, granted)	5/22/01
TD-2002-3	Long Distance America, Inc. (Certificate of service authority, IXC, canceled)	7/12/01
TA-2001-545	Long Distance of Michigan, Inc., d/b/a FoneTel (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, approved).....	5/17/01
TD-2002-132	Love, Greg d/b/a Mid-America Telcom (Certificate of service authority, pay phones, canceled)	9/6/01
TD-2001-656	Lulbowski, Gene (Certificate of service authority, pay phones, canceled)	6/4/01

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SC-2001-126	McClain vs Stoddard County Sewer Company (Complaint case, complaint dismissed)	8/2/01
TO-2001-465	MCI WorldCom Communications, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, adoption of interconnection agreement between MCI/metro Access Transmission Services, LLC and Southwestern Bell Telephone Company, granted)	3/27/01
TO-2002-60	Metro Teleconnect Companies, Inc. (Resale agreement with Southwestern Bell Telephone Company, approved) ..	9/11/01
TA-2002-46	Metro Teleconnect Companies, Inc. (Certificate of service authority, basic local exchange telecommunications services, granted)	10/25/01
TO-2001-644	Mid-Missouri Telephone Company (Interconnection agreement with Missouri State Discount Telephone, approved)	8/1/01
TA-2002-35	Mid-Plains Communications, Inc. (Certificate of service authority, basic local exchange telecommunication service, granted)	11/28/01
TM-2001-448	Miller Telephone Company (Acquisition of all of the capital stock of the Miller Telephone Company by TelAtlantic Communications, Inc., approved)	9/18/01
TD-2001-709	Minimum Rate Pricing, Inc. (Certificate of service authority, IXC, canceled)	7/12/01

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GE-2001-647	Missouri Gas Energy (Variance from Commission rule, a gas safety standard that requires that certain non-hazardous gas leaks be repaired within five years, granted)	6/19/01
GA-2001-509	Missouri Gas Energy (Certificate of public convenience and necessity, providing natural gas service to an area in Newton County, an expansion of its existing certificated area, granted)	10/16/01
TA-2001-334	Missouri State Discount Telephone (Certificate of service authority, basic local exchange and IXC, granted)	3/16/01
TA-2001-446	Monaco, Victor (Certificate of service authority, pay phones, granted)	4/10/01
TM-2001-429	Mpower Communications Corp. and Mpower Communications Central Corp. (Internal corporate restructuring and related transactions, granted)	4/19/01
TD-2001-679	Murdock, Remmers & Associates, Inc. (Certificate of service authority, IXC, canceled)	6/19/01
TO-2001-620	MVX.COM Communications, Inc. (Name change to Quantum Shift Communications, Inc., recognized)	10/4/01
TD-2002-189	MVX Communications, LLC (Certificate of service authority, IXC, canceled)	10/29/01

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TA-2001-308	National Telecommunications, LLC d/b/a National Telco (Certificate of service authority, basic local exchange telecommunications services, granted)	3/6/01
TO-2001-424	National Telecommunications, LLC, d/b/a National Telco (Interconnection agreement with Southwestern Bell Telephone Company, granted)	3/22/01
TD-2002-21	Nationwide Long Distance, Inc. (Certificate of service authority, IXC, canceled)	7/20/01
TD-2001-675	NET-tel Corporation (Certificate of service authority, basic local and IXC, canceled)	6/19/01
TA-2002-188	Network US, Inc. d/b/a CA Affinity (Certificate of service authority, IXC, granted)	11/19/01
TA-2001-560	New Access Communications LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, approved)	5/18/01
TD-2001-714	New Media Telecommunications, Inc. (Certificate of service authority, IXC, canceled)	7/12/01
TD-2002-106	Newsome, James (Certificate of service authority, pay phones, canceled)	8/29/01
TA-2001-377	Norstar Communications Inc. d/b/a Business Savings Plan Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	2/2/01
TA-2001-399	North County Communications Corporation (Certificate of service authority, basic local exchange telecommunications services, granted)	3/29/01
TM-2001-551	NorthPoint Communications, Inc. (Transfer of assets to AT&T, approved)	4/23/01
TA-2002-41	NTERA, INC. (Certificate of service authority, IXC, granted)	8/28/01
TD-2001-711	NTI Telecom, Inc. (Certificate of service authority, IXC, canceled).....	7/12/01

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TD-2002-128	OmniCall, Inc. (Certificate of service authority, IXC, canceled)	9/14/01
TM-2002-133	Omniplex Communications Group, L.L.C. (Transfer of assets to Ciera Network Systems, Inc., granted)	10/26/01
TA-2002-52	One Call Communications, Inc., d/b/a 1-800-Max-Save (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	8/29/01
TA-2002-53	One Call Communications, Inc., d/b/a Advant Tel (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	8/29/01
TA-2001-389	1-800-RECONEX, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	2/22/01
TO-2001-576	1-800-RECONEX, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved)	6/19/01
TD-2001-687	One Step Billing, Inc. (Certificate of service authority, IXC, canceled)	6/26/01
TA-2000-709	OnFiber Carrier Services, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	3/9/01
TA-2000-692	OnSite Access Local, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	5/4/01
TD-2002-37	OnSite Access Local, LLC (Certificate of service authority, basic local, local exchange and IXC services, canceled) ..	8/10/01
TA-2001-591	Osage Valley Technologies, L.L.C. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	5/24/01
WD-2001-701	Ozark Shores Water Company (Certificate of public convenience and necessity to provide sewer service to Summerhaven Condominiums, canceled)	9/20/01

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TA-2001-384	Partner Communications & Services, Inc. (Certificate of service authority, nonswitched local exchange telecommunications services, granted)	3/12/01
TD-2001-696	Partner Communications and Services, Inc. (Certificate of service authority, IXC, canceled)	7/2/01
TD-2001-694	Partner Communications and Services, Inc. (Certificate of service authority, local exchange telecommunications services, canceled).....	7/2/01
TO-2001-420	Payroll Advance, Inc. (Interconnection agreement with ALLTEL Missouri, Inc., granted)	3/22/01
TA-2002-207	Pennick, Paul P. (Certificate of service authority, pay phones, granted)	11/19/01
TD-2001-403	Peoples Telephone Company, Inc. (Certificate of service authority, IXC, canceled)	2/21/01
TO-2001-469	Phone Bank, Inc., d/b/a Phone Banc, Inc. (Resale agreement with Southwestern Bell Telephone Company, granted) ...	4/3/01

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TA-2001-433	PNG Telecommunications, Inc. (Certificate of service authority, basic local telecommunications services, granted)	4/10/01
TD-2002-20	Polarnet Corp. (Certificate of service authority, IXC, canceled)	7/12/01
TM-2001-327	Premiere Communications, Inc. (Transfer and sale of certain retail long distance calling card assets to Telecare, Inc., approved)	2/15/01
TA-2001-235	Premiere Network Services, Inc. (Certificate of service authority, basic local and IXC telecommunications services, granted)	3/2/01
TA-2001-590	Premiere Paging & Cellular, Inc. (Certificate of service authority, local telecommunications services, granted) ...	7/23/01
WO-2001-326	Public Water Supply District No. 3 of Franklin County (Water territorial agreement with the City of Washington, encompassing part of Franklin County, approved)	3/22/01

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TA-2001-611	QuantumShift Communications, Inc. (Certificate of service authority, IXC, granted)	6/8/01
TO-2002-34	QuantumShift Communications, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved)	8/28/01
TA-2001-519	Quick Tel, Inc. (Certificate of service authority, IXC, granted)	4/27/01
TO-2001-607	Qwest Communications Corporation (Interconnection agreement with Southwestern Bell Telephone Company, approved)	6/11/01
TM-2001-628	Qwest Communications Corporation (Series of merger transactions, Qwest and its affiliates, LCI International Telecom Corp., Phoenix Network, Inc., and USLD Communications, Inc., in order to effectuate a corporate restructuring, approved)	10/30/01
TA-2002-119	Qwest Interprise America, Inc. (Certificate of service authority, pay phones, granted)	9/21/01

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TA-2002-55	Reduced Rate Long Distance, LLC (Certificate of service authority, IXC, granted)	9/18/01
WR-2001-457	Rex Deffenderfer Enterprises, Inc. d/b/a RDE Water Company (Water rate increase, granted).....	4/5/01
TD-2001-649	Riddle, Jeff (Certificate of service authority, pay phones, canceled)	6/5/01
TD-2001-623	RSL COM PrimeCall, Inc. (Certificate of service authority, IXC, canceled)	5/22/01

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TA-2002-30	Sage Telecom, Inc. (Certificate of service authority, IXC, granted)	8/22/01
TA-2002-29	Sage Telecom, Inc. (Certificate of service authority, resold and facilities-based basic local telecommunications services, granted)	9/13/01

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TD-2002-5	Satlink 3000, Inc. (Certificate of service authority, IXC, canceled)	7/12/01
TO-2001-481	SBC Advanced Solutions, Inc. (Resale and facilities-based interconnection agreement with Logix Communications Corporation, approved)	4/20/01
TO-2001-667	SBC Advanced Solutions, Inc. (Interconnection agreement with DSLnet Communications, LLC, approved)	7/10/01
TO-2002-45	SBC Advanced Solutions, Inc. (Interconnection agreement with IG2, Inc. approved)	8/29/01
TD-2001-673	SBR, Inc. (Certificate of service authority, IXC, canceled) .	6/19/01
TA-2001-468	Schoonmaker, Earl F. (Certificate of service authority, pay phones, granted)	4/23/01
TA-2002-174	Schulte, Jim d/b/a JP Connections (Certificate of service authority, pay phones, granted)	11/6/01
TD-2002-124	Smith Enterprises, LLC (Certificate of service authority, pay phones, canceled)	9/13/01
TA-2001-370	Smith, Michael (Certificate of service authority, pay phones, granted)	2/8/01
TA-2001-650	Socket Telecom, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	7/2/01
TA-2001-671	Socket Telecom, LLC (Certificate of service authority, basic local exchange telecommunications services, granted) ...	8/3/01
TD-2002-64	Socket Communications Group, Inc. (Certificate of service authority, basic local exchange and IXC, canceled)	8/14/01
TA-2001-655	Sonix4U, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	6/29/01
TA-2001-285	Southern Telcom Network, Inc. (Certificate of service authority, basic local telecommunications services, granted)	3/2/01
TO-2001-619	Southern Telcom Network, Inc. (Resale agreement with Southwestern Bell Telephone Company, approved)	6/20/01
TM-2001-708	Southwest Fiber Communications, LLC (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	9/28/01
TO-2001-437	Spectra Communications Group, LLC d/b/a CenturyTel (Recognizing name change)	3/1/01
TO-2001-411	Spectra Communications Group, LLC (Interconnection agreement with Missouri State Discount Telephone, granted) ...	3/5/01
TO-2001-413	Spectra Communications Group, LLC (Interconnection agreement with Trans National Telecommunications, Inc., granted)	3/6/01
TO-2001-410	Spectra Communications Group, LLC (Local Traffic Exchange and Reciprocal Compensation Agreement with Missouri Telecom, Inc., granted)	3/6/01
TO-2001-597	Spectra Communications Group, LLC (Resale agreement with Tri-State Telecommunications, Inc., d/b/a The Phone Company, approved)	6/4/01
TO-2001-597	Spectra Communications Group LLC (Amended resale agreement with Tri-State Telecommunications, Inc., approved)	7/24/01

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TO-2001-691	Spectra Communications Group, LLC (Resale agreement with dPi Teleconnect, LLC, approved)	7/30/01
TD-2002-54	Speer Virtual Media, Ltd. (Certificate of service authority, IXC, canceled)	8/30/01
TO-2001-367	Sprint Communications Company, L.P. (Order recognizing adoption of interconnection agreement with Sprint Missouri, Inc.)	3/6/01
TO-2001-479	Sprint Missouri, Inc. (Interconnection agreement with Metropolitan Telecommunications of Missouri, Inc., approved)	4/17/01
TO-2001-480	Sprint Missouri, Inc., d/b/a Sprint (Commercial Mobile Radio Services Type 2B interconnection agreement with Mid-Missouri Cellular, approved)	4/10/01
TO-2001-555	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Zephion Networks Communications, Inc., approved)	5/17/01
TO-2001-561	Sprint Missouri, Inc., d/b/a Sprint (Interconnection agreement with Northwest Missouri Cellular, approved)	5/24/01
TO-2001-558	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Tri-State Telecommunications d/b/a The Phone Company, approved)	5/29/01
TO-2001-552	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Missouri State Discount Telephone, approved)	6/18/01
TO-2001-630	Sprint Missouri, Inc. d/b/a Sprint (Wireless interconnection agreement with WWC License L.L.C., approved)	6/21/01
TO-2001-632	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with Missouri Network Alliance, LLC, approved)	6/25/01
TO-2001-665	Sprint Missouri, Inc. d/b/a Sprint (Resale agreement with Camarato Distributing, Inc., approved)	7/6/01
TO-2001-668	Sprint Missouri, Inc. d/b/a Sprint (Interconnection agreement with American Fiber Network, Inc., approved)	7/11/01
TO-2002-140	Sprint Missouri, Inc. (Interconnection agreement with KMC Telecom Holdings, Inc. d/b/a KMC Telecom V, approved) ..	10/15/01
TD-2001-688	STA Telecommunications Corp. (Certificate of service authority, IXC canceled)	6/18/01
GR-2000-574	St. Joseph Light & Power Company (Purchased Gas Adjustment, 1999-2000 Actual Cost Adjustment, order establishing ACA balance and closing case)	10/23/01

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TO-2001-528	Talk.com Holding Corp., d/b/a The Phone Company (Interconnection agreement with Southwestern Bell Telephone Company, approved)	5/17/01
TA-2002-164	TalkNow, Inc. (Certificate of service authority, IXC, granted)	10/31/01
TA-2001-581	Taylor, Kent (Certificate of service authority, pay phones, granted)	6/7/01
TO-2001-626	TDS Telecommunications Corporation (Mutual Traffic Exchange Agreement with Sprint Communications Company, L.P., approved)	6/19/01
TD-2001-406	Telaleasing Enterprises, Inc. (Certificate of service authority, IXC, canceled)	3/12/01

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TD-2002-4	Telcom Network, Inc. (Certificate of service authority, IXC, canceled)	7/12/01
TD-2001-674	Telec, Inc. (Certificate of service authority, IXC, canceled)	6/22/01
TA-2001-609	TELECOMEZ Corp (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	6/13/01
TA-2001-683	TELEFYNE INCORPORATED (Certificate of service authority, IXC, granted)	7/17/01
TO-2001-432	Teleglobe Business Solutions, Inc. (Name change to eMeritus Communications, Inc., recognized)	4/30/01
TA-2001-409	Telergy Network Services, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	3/12/01
TA-2001-205	Telergy Network Services, Inc. (Certificate of service authority, basic local and exchange access telecommunications services, granted)	9/11/01
TA-2001-408	Telmex USA, L.L.C. (Certificate of service authority, IXC, granted)	3/29/01
TA-2001-425	Telseon Carrier Services, Inc. (Certificate of service authority, IXC and nonswitched local exchange telecommunications services, granted)	3/12/01
TA-2001-380	Texas HomeTel, Inc., d/b/a 877-Ring Again (Certificate of service authority, basic local telecommunications services, granted)	3/29/01
TO-2001-602	Texas HomeTel, Inc. d/b/a 877-Ring Again (Resale agreement with Southwestern Bell Telephone Company, approved)	6/4/01
TO-2002-165	The Pager Company (Name change to The Pager Company d/b/a The Pager & Phone Company, recognized)	10/23/01
TA-2001-415	3rd Wire, Inc. (Certificate of service authority, IXC and nonswitched local telecommunications services, granted)	3/15/01
TA-2001-414	3rd Wire, Inc. (Certificate of service authority, basic local telecommunications services, granted)	3/20/01
TD-2002-187	Thompson, D.C., d/b/a Thompson Telephone (Certificate of service authority, pay phones, canceled)	10/30/01
TA-2001-281	360networks (USA) inc. (Certificate of service authority, basic local exchange telecommunications services, granted)	3/6/01
TA-2001-645	Tolley, Toni M. (Certificate of service authority, pay phones, granted)	6/18/01
TA-2001-510	Total Call International, Inc. (Certificate of service authority, IXC, granted)	5/1/01
TA-2000-359	Trans National Telecommunications, Inc. (Certificate of service authority, conditional approval withdrawn, certificate canceled, tariffs rejected, case dismissed)	10/16/01
TM-99-381	TresCom USA, Inc. (Certificate of service authority, IXC, canceled).....	9/11/01
TA-2001-596	Tri-State Telecommunications, Inc.d/b/a The Phone Company (Certificate of service authority, basic local exchange telecommunications services, granted)	7/3/01
TA-2002-196	T&T Communications, LLC (Certificate of service authority, pay phones, granted)	11/27/01

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GA-2001-657	Union Electric Company d/b/a AmerenUE (Certificate of public convenience and necessity to provide natural gas service in the City of Flint Hill, granted)	10/4/01
TO-2001-454	Universal Telecom, Inc. (Resale agreement with Southwestern Bell Telephone Company, approved)	4/3/01
TD-2002-38	USA Global Link, Inc. (Certificate of service authority, IXC, canceled)	8/10/01
TD-2001-710	USA Tele Corp. (Certificate of service authority, IXC, canceled).....	7/12/01
TD-2001-678	USBG, Inc. (Certificate of service authority, IXC, canceled)	6/18/01
TM-2001-70	U.S. Republic Communications, Inc. (Sale of assets to Alliance Group Services, Inc., approved)	6/19/01
TD-2002-104	US Telco, Inc. (Certificate of service authority, basic local telecommunications services, canceled)	8/31/01
TO-2002-168	U.S. West Interprise America, Inc. (Name change to Qwest InterpriseAmerica, Inc., recognized)	10/31/01
TD-2001-677	Utility.com, Inc. (Certificate of service authority, IXC, canceled)	7/2/01

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TD-2002-102	Valu-Line of Kansas, Inc. (Certificate of service authority, IXC, canceled)	8/29/01
TA-2001-363	VarTec Telecom, Inc. (Certificate of service authority, basic local telecommunications services, granted)	3/6/01
TD-2002-105	Vectris Telecom, Inc. (Certificate of service authority, basic local telecommunications services, canceled)	8/28/01
TD-2002-2	V.I.P. Telephone Network, Inc. (Certificate of service authority, IXC, canceled)	7/12/01
TD-2001-712	Vista Group International, Inc. (Certificate of service authority, IXC, canceled)	7/12/01
TO-2001-449	VoiceStream Wireless Corporation (Interconnection agreement with GTE Midwest Incorporated, adoption of interconnection agreement between GTE Midwest and Nextel West Corporation, granted)	3/27/01
TO-2001-489	VoiceStream Wireless Corporation (Interconnection agreement with Southwestern Bell Telephone Company, granted) ...	4/17/01

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TA-2001-501	West End Communications, Inc. (Certificate of service authority, IXC, granted)	4/27/01
TD-2001-490	Western Tele-Communications, Inc./Retail Sales Group d/b/a People Link by TCI (Certificate of service authority, IXC, canceled)	4/4/01
TO-2001-536	Williams Communications, Inc. (Name change to Williams Communications LLC, d/b/a Williams VYVX, LLC, recognized)	4/30/01

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TO-2001-535	Williams Local Network, Inc. (Name change to Williams Local Network, LLC, recognized)	4/30/01
TA-2001-447	Winkley, Steve (Certificate of service authority, pay phones, granted)	4/10/01
TD-2002-22	World Call Telecommunications (Certificate of service authority, IXC, canceled)	9/13/01
TA-2002-7	World Communications Satellite Systems, Inc. (Certificate of service authority, IXC, granted)	9/10/01
TA-2001-373	World Telecom, Inc. (Certificate of service authority, IXC, granted)	2/6/01

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TA-2001-365	Zmail Media, Inc. (Certificate of service authority, pay phones, granted)	2/7/01
TD-2001-567	Zmail Media, Inc. (Certificate of service authority, pay phones, canceled)	4/18/01
TD-2002-103	ZoCom Technologies of Missouri, Inc. (Certificate of service authority, IXC, pay phones, canceled)	8/29/01
TO-2001-366	Z-Tel Communications, Inc. (Interconnection agreement with Southwestern Bell Telephone Company, approved)	2/2/01

**REPORTS OF
THE PUBLIC SERVICE COMMISSION
OF THE
STATE OF MISSOURI**

**In the Matter of Missouri Gas Energy's Tariff Sheets Designed
to Increase Rates for Gas Service in the Company's Service
Area.***

*Case No. GR-96-285
Decided February 1, 2001*

Gas §§17, 18. The \$8,847,088 revenue increase granted Missouri Gas Energy in the Commission's Report and Order issued January 22, 1997, and its subsequent orders, must be applied to the customer classes as an equal percentage increase (i.e., 68.22 percent for Residential; 0.01 percent for Un-metered Gas Lights; 21.22 percent for Small General Service; 2.65 percent for Large General Service; and 7.90 percent for Large Volume Service).

APPEARANCES

Gary W. Duffy, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for Missouri Gas Energy, a division of Southern Union Company.

Jeremiah D. Finnegan, Finnegan, Conrad & Peterson, 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri 64111, for Central Missouri State University, and University of Missouri-Kansas City.

Stuart W. Conrad, Finnegan, Conrad & Peterson, 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri 64111, for Midwest Gas Users Association.

Douglas E. Micheel, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102-7800, for the Office of the Public Counsel and the public.

Thomas R. Schwarz, Jr., Deputy General Counsel, and *Robert Franson*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

*See Volume 5, MPSC 3d page 437 and Volume 9 MPSC 3d page 327 for other orders in this case. On March 1, 2001, the Public Service Commission issued an order denying rehearing in this case. On March 12, 2001, this case was appealed to Cole County Circuit Court (CV197357CC).

Charles Brent Stewart and Jeffrey A. Keevil, Stewart & Keevil, L.L.C., Attorneys at Law, 1001 Cherry Street, Suite 302, Columbia, Missouri 65201-7931, for Riverside Pipeline Company, L.P. and Mid-Kansas Partnership.

Bruce A. Dotson, Bruce A. Dotson Law Firm, 1124 SW Main Street, Blue Springs, Missouri 64015-3612, for Gas Service Retirees Association of Missouri, Inc.

Frank W. Taylor, Jr., Dysart Taylor Lay Cotter & McMonigle, P.C., 4420 Madison Avenue, Kansas City, Missouri 64111, for Home Builders Association of Kansas City.

Mark W. Comley and Catherine Martin, Newman, Comley & Ruth, P.C., 205 East Capitol Avenue, Post Office Box 537, Jefferson City, Missouri 65102-0537, for City of Kansas City, Missouri.

REGULATORY LAW JUDGE: Shelly A. Register.

REPORT AND ORDER

I. Procedural History

A. Original Case

On March 1, 1996, Missouri Gas Energy (MGE or Company), a division of Southern Union Company (Southern Union), filed tariff sheets with the Commission to increase rates for gas service provided to customers in its Missouri service area. The proposed tariff sheets were designed to produce an annual increase of approximately 13.04 percent (\$34,019,650) in the Company's revenues.

On March 8, 1996, the Commission issued an order and notice relating to the tariff sheets. In that order and notice, the Commission did not suspend the tariff sheets because they bore an effective date of February 1, 1997.

On March 11, 1996, the Company filed a cover letter along with substitute tariff sheets. The cover letter stated that the tariff sheets filed therewith were identical to the tariff sheets filed on March 1, 1996, except for the proposed effective date. The substitute tariff sheets bore a proposed effective date of April 3, 1996.

On March 13, 1996, the Commission suspended these tariffs for a period of 120 days from April 3, 1996, plus an additional six months to February 1, 1997. The Commission also established an intervention deadline of April 8, 1996.

On March 21, 1996, the Commission granted MGE's motion for a protective order filed March 19, 1996. On April 26, 1996, the Commission established a procedural schedule. On May 2, 1996, the Commission established the test year as the 12-month period ending September 30, 1995, updated through May 31, 1996. The Commission subsequently issued an order on May 24, 1996, changing the test year to the 12-month period ending March 31, 1996, updated through May 31, 1996.

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On May 3, 1996, the Commission granted intervention to numerous builders and developers, denominating these parties as the Kansas City Area Real Estate Developers¹ (KC Developers) for purposes of this proceeding. The Commission also granted intervention to the City of Kansas City, Missouri (Kansas City); the County of Jackson, Missouri (Jackson County); University of Missouri-Kansas City (UMKC); Central Missouri State University (CMSU); Local No. 53, International Brotherhood of Electrical Workers (IBEW-Local 53); Gas Service Retirees' Association of Missouri (GSRAM); Williams Natural Gas Company (WNG); Riverside Pipeline Company, L.P., and Mid-Kansas Partnership (Riverside/Mid-Kansas); Kansas City Power & Light Company (KCPL); St. Joseph Light & Power Company (SJLP); Mountain Iron & Supply Company (Mountain Iron); UtiliCorp United Inc., d/b/a UtiliCorp Energy Services (UtiliCorp); and Midwest Gas Users Association (MGUA). On May 9, 1996, the Commission granted the City of St. Joseph's (St. Joe) application to participate without intervention, out of time.

An evidentiary hearing was held on October 21, October 25, October 30, October 31, and December 12, 1996. On October 30, 1996, the Staff of the Missouri Public Service Commission (Staff), the Office of the Public Counsel (Public Counsel), MGUA, UMKC, and Jackson County filed a Stipulation and Agreement, in relevant part related to the class cost of service and related revenue shifts. The Commission issued a notice to the parties giving them until November 6, 1996, to file any objection to the terms of the agreement pursuant to Commission Rule 4 CSR 240-2.115. No party filed any objections to the agreement.

On January 22, 1997, the Commission issued its Report and Order in which the Commission granted an annual revenue increase of approximately \$7.5 million, which was subsequently amended to \$8.847 million. The Commission also rejected the Stipulation and Agreement related to the class cost of service and related revenue shifts. The Commission noted that if it approved this Stipulation and Agreement, the residential ratepayers would have borne 99.31 percent of the revenue requirement increase if the increase were \$6,096,685; 79.07 percent of the revenue requirement increase if the increase were \$10,096,685; and 68.42 percent of the revenue requirement increase if the increase were \$15,040,320. The Commission found that it would be poor public policy to force residential ratepayers to fund more than their previously allocated share of MGE's revenue requirement and ordered the revenue requirement increase be allocated among the customer classes on the same basis as current revenues (i.e., 68.22 percent for Residential

¹ The applicants designated as Kansas City Area Real Estate Developers include Summit Builders, Inc., JKL Development, Inc./Patterson Peters Development, Inc., Winterset Park, Inc., Patterson and Peters Land Company, Inc., Parker-Jones Development, Inc., Longhorn Asset Management, Inc., Jim Robertson Plumbing, Inc., Maple Tree Development, Inc., MDM Development, Inc., Baldwin Properties Inc., Savannah Development, Inc., Terra Land Development Company, Acuff-Lutz Homes, Inc., Aartech Investments, Inc., The Peterson Companies, Cumberland Properties, Inc., and Hunt Midwest Real Estate Development, Inc. Dysart Taylor Lay Lewandowski & Cotter, P.C., Attorneys, who requested that the intervenors be designated as Kansas City Area Developers/Intervenors, represented all of these applicants.

(RES); 0.01 percent for Unmetered Gas Lights (UGL); 21.22 for Small General Service (SGS); 2.65 percent for Large General Service (LGS); and 7.90 percent for Large Volume Service (LVS)).

On January 24, 1997, Public Counsel filed a motion for clarification, a request for an order *nunc pro tunc*, and a request for expedited treatment of its motion. Public Counsel noted that the Commission adopted Public Counsel's recommendation that Southern Union's incentive compensation plan be excluded from the cost of service on page 36-37 of the Commission's January 27, 1997 Report and Order. However, the \$65,000 associated with the incentive compensation plan was not deducted from the revenue requirement. On January 27, 1997, Staff filed a motion for clarification in which Staff agreed with Public Counsel's motion asking that the revenue requirement be reduced by \$65,000 in order to be consistent with the Commission's findings regarding the incentive compensation plan. In addition, Staff recommended a reduction of the revenue requirement relating to uncollectible expenses to be consistent with the Commission's findings, a correction of language on lines 26-27 of page 58 of the Report and Order from "contract demand charge" to "transportation charge" for LVS customers, and clarification regarding block rates and seasonal rates. The Commission granted both Public Counsel's and Staff's motions for clarification on January 29, 1997, authorizing a change in the revenue requirement increase from \$7,527,513 to \$7,533,431. The Commission also amended the language on lines 26-27 of page 58 of the Report and Order from "contract demand charge" to "transportation charge," and authorized MGE to maintain block rates and seasonal rates for SGS, LGS and LVS customers.

On January 31, 1997, applications for rehearing were filed by MGE, Public Counsel, Riverside/Mid-Kansas, Jackson County, and MGUA. On February 28, 1997, the Commission issued its Order Granting in Part and Denying in Part Applications for Rehearing finding that the only issue which should be addressed was the correction of an error in calculation of the revenue requirement scenarios using customer charges that were not prorated as previously agreed by Staff and MGE. MGE was directed to file tariff sheets to reflect prorating of customer charges. The proration calculations had not been identified as an issue in the Hearing Memorandum because the parties believed the matter had already been resolved.

On March 12, 1997, MGE filed a motion for clarification asking the Commission to clarify the results of its Order Granting in Part and Denying in Part Applications for Rehearing, which the Commission granted on March 18, 1997. The Commission clarified that the proration of customer charges as a result of a reduction in service required an adjustment to the revenue requirement granted, resulting in a \$1,313,657 shift of revenue from the customer charge to commodity or energy charge and that this adjustment did not produce an additional or new revenue for MGE. The Commission directed MGE to file its tariffs designed to recover a revenue requirement increase of \$8,847,088.

On March 20, 1997, Public Counsel filed its Second Application for Rehearing and the Commission issued its Order Denying Second Application for Rehearing.

B. Review

On April 21, 1997, MGUA appealed the rate design issues to the Circuit Court of Cole County (circuit court) alleging that the Commission failed to provide due

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process relating to those issues included in the rejected Stipulation and Agreement. MGE timely filed its Petition for Writ of Review in the circuit court alleging that it was entitled to an annual increase of more than \$8.847 million as well as other issues. The two cases were not consolidated. The circuit court issued a judgment on MGE's petition on July 18, 1997, and MGE filed its notice of appeal on August 4, 1997.

On November 26, 1997, the circuit court issued its Findings of Fact, Conclusions of Law, Order and Judgment reversing the ruling of the Commission insofar as the rates were approved without a hearing on the rate design issues of class cost of service and revenue shifts as required by law. The case was remanded to the Commission for further proceedings. On November 26, 1997, the circuit court issued an Order Granting Stay to preserve the status quo for rate levels existing for LVS transportation customers prior to the effective date of the increases authorized by the Commission's January 22, 1997 Report and Order, pending a final ruling on the merits of the Petition for Writ of Review. The circuit court directed that funds be deposited into the court registry or that a bond in the amount required by law to be filed. MGE appealed, challenging the circuit court's subject matter jurisdiction under Section 386.520, RSMo, to grant such a stay order and an impoundment order.

MGE appealed to the Missouri Court of Appeals, Western District (Court of Appeals), and on May 11, 1999, the Court of Appeals affirmed the circuit court's subject matter jurisdiction to enter its order granting stay and impounding funds and also upheld the circuit court's order affirming the Commission's decision granting MGE a revenue requirement increase of \$8,847,088. MGE's motion for Rehearing and/or Transfer to the Supreme Court was denied June 29, 1999, and its Application for Transfer was denied August 24, 2000.

C. Proceedings on Remand

On April 5, 2000, MGE filed a Motion to Establish Procedural Schedule with the Commission, requesting that the Commission permit brief supplemental direct and rebuttal testimony, beginning on April 20, 2000. On April 17, 2000, MGUA and Public Counsel filed their responses opposing MGE's request for supplemental evidence. On the same day, Staff filed its response in support of MGE's request for supplemental evidence. MGE filed its responses to MGUA's and Public Counsel's suggestion in opposition on April 18 and 19, 2000. On April 20, 2000, MGE filed the Direct Testimony on Remand of Brad Lewis. On May 5, 2000, MGE filed its suggestions in support of additional testimony on remand.

On May 10, 2000, the Commission issued its order reopening this case on remand for further proceedings, directing the parties to file a list of exhibits relevant to the issues on remand. On May 11, 2000, the Commission issued an order scheduling the remand hearing for August 8 and 9, 2000, allowing limited supplemental direct and rebuttal testimony, and directing the parties to file a proposed procedural schedule in compliance with the ordered hearing dates.

On May 22, 2000, MGUA filed its application for rehearing or reconsideration of the Commission's Order issued May 11, 2000, permitting filing of supplemental

testimony.² On May 25, 2000, MGE filed its response to MGUA's application for rehearing. On May 30, 2000, MGE filed a proposed procedural schedule agreed to by the parties, subject to pending motions. On June 12, 2000, the Commission adopted a procedural schedule with which the parties complied.

On June 7, 2000, GSRAM requested by letter that it be permitted to remain a party of record and stating that it did not expect to participate fully in this case as long as the issue on remand was limited to rate design. On June 26, 2000, Riverside/Mid-Kansas requested that they be permitted to remain parties in this case and stated that they did not expect to fully participate in the remand hearing as long as the only issue to be heard was rate design. On June 29, 2000, a prehearing conference was held.

On July 26, 2000, Public Counsel filed a Motion to Strike Portions of the Direct Testimony on Remand of Brad Lewis. On August 4, 2000, MGE filed its response to Public Counsel's motion to strike. On August 7, 2000, MGUA filed its Motion to Strike Testimony. The Commission took both motions under advisement and the parties were permitted to submit arguments on these motions in their briefs.

An evidentiary hearing was held on August 8 and 9, 2000. Upon commencement of the hearing, MGE moved that all parties not appearing at the hearing be dismissed. No objections were received. On September 14, 2000, the Commission issued its order granting in part MGE's motion to dismiss parties not appearing at the hearing on August 8, 2000, pursuant to Rule 4 CSR 240.116(3). Parties dismissed by this Commission order were Jackson County, IBEW-Local 53, WNG, KCPL, SJLP, Mountain Iron, St. Joe, and UtiliCorp.

Public Counsel and Staff filed their initial briefs on September 25, 2000. MGE and MGUA filed their initial briefs on September 26, 2000. MGUA filed substitute pages to its initial brief on October 2, 2000. On October 5, 2000, MGE, Staff, Public Counsel and MGUA filed reply briefs and MGUA filed a revised table of contents page on October 12, 2000.

D. Pending Motions

1. Public Counsel's Motion to Strike Testimony

On July 26, 2000, Public Counsel filed its motion to strike portions of the direct testimony on remand of MGE's witness, Brad Lewis, Exhibit 182. In its motion to strike, Public Counsel stated that Lewis' testimony contains numerous references to events outside the test year established for Case No. GR-96-285 which are not relevant to the issues on remand. Public Counsel requested that the Commission exclude all testimony regarding facts occurring after January 1997. Public Counsel requested that the Commission strike the following portions of Exhibit 182:

- p. 2, line 16, beginning "The Cole County..." through line 21.

² Because of the time that has passed since the Commission issued its original Report and Order in this case (January 22, 1997), the Commission has tried to expedite the hearing procedure in this case so as to render a decision by the Commission on the issues on remand as soon as possible. Therefore, the Commission will rule upon this Application for Rehearing or Reconsideration along with any other motions for rehearing received following the issuance of this Report and Order.

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- p. 4, lines 17-22.
- p. 7, lines 19-26.
- pp. 8 through 12.
- p. 13, lines 1-12.
- p. 14, line 8, beginning "In addition..." through line 14.

On August 4, 2000, MGE filed its response to Public Counsel's motion to strike testimony. MGE argued that Public Counsel failed to provide any legal basis upon which its motion could be granted. MGE responded to the claim that the supplemental testimony was not relevant to the issues on remand by noting that the test of relevance is whether some fact tends to prove or disprove an issue. *Oldaker v. Peters*, 817 S.W.2d 245 (Mo. 1991); *Environmental Waste Management, Inc. v. Industrial Excavating & Equipment, Inc.*, 981 S.W.2d 607 (Mo. App. W.D. 1998). MGE pointed out that Mr. Lewis is not sponsoring evidence that changes the test year or any evidence already in the record. MGE stated that these circumstances are somewhat unique, that this is not a typical rate case, and that several things have occurred in the time it took to process the appeals from the Commission's original order. MGE stated that Mr. Lewis' testimony recited the intervening procedural events, described MGE's current position on remand and explained why MGE changed its position. MGE cites *State ex rel. Utility Consumers Council of Missouri, et al. v. P.S.C.*, 585 S.W.2d 41, 56 (Mo. banc 1979), which requires the Commission to consider "all relevant factors" in setting rates. *See also, State ex rel. Missouri Water Co. v. Public Service Comm'n*, 308 S.W.2d 704, 719 (Mo. 1957); *State ex rel. Midwest Gas Users' Ass'n v. Public Service Commission*, 976 S.W.2d 470, 479 (Mo. App. W.D. 1998); *State ex rel. Office of Public Counsel v. Public Service Com'n of Missouri*, 858 S.W.2d 806 (Mo. App. W.D. 1993). Finally, MGE stated that no party had demonstrated any prejudice as a result of the testimony submitted on remand.

At the hearing on August 8, 2000, the Commission took Public Counsel's motion to strike under advisement and directed the parties to brief the Commission on the issues raised in the motion. The Commission has examined all the relevant evidence and arguments regarding the part of the testimony subject to Public Counsel's motion to strike.

In his direct testimony, Brad Lewis stated in part:

The Cole County Circuit Court also entered a stay order, by which it directed MGE to pay certain moneys into the Court's registry until otherwise ordered by the Court. The stay order is attached to this testimony as **Schedule BL-2**. To date, MGE has paid approximately \$1.25 million into the Court's registry in compliance with the stay order. On a monthly basis, MGE pays approximately \$50,000 into the Court's registry.

Ex. 182, Direct Testimony on Remand of Brad Lewis, p. 2, lines 16-21. The Commission finds that the first sentence of this testimony simply restates the facts that would already be found in the circuit court's record. In addition, these

procedural facts are relevant because they explain why the Commission continues to have jurisdiction over this case even though the rates set in the tariff approved have been superceded by the tariffs approved in Case No. GR-98-140. While interim rates may be superceded by the approval of permanent rates, one rate design does not necessarily supercede another on appeal. See *State ex rel. Monsanto Co. v. Public Service Com'n of Missouri*, 716 S.W.2d 791 (Mo. banc 1986); *State ex rel. Missouri Cable Television Ass'n. v. Missouri Public Service Com'n*, 917 S.W.2d 650 (Mo. App. W.D. 1996); *State ex rel. County of Jackson v. Missouri Public Service Com'n*, 985 S.W.2d 400 (Mo. App. W.D. 1999); *In Re Southwestern Bell Telephone Company's Proposed Revision to General Exchange Tariff*, P.S.C. Mo-No. 35, 18 S.W.3d 575 (Mo. App. W.D. 2000).

Regarding the testimony relating to the deposit of funds into the court registry, the Commission does not need to consider those funds in order to render its decision. However, procedurally, the circuit court's order does explain why there is a need for the Commission to render its decision at the earliest possible date. Therefore, the Commission finds that the testimony on page 2, lines 16 through 21, of Exhibit 182 should not be stricken and should be considered by the Commission for procedural purposes and given the weight due such evidence.

The remaining portions of the testimony to which Public Counsel objected refer to MGE's argument that the procedural facts relating to the circuit court's stay order and the monies deposited into the court registry should be considered as one relevant factor in the Commission's decision on the substantive issues being considered on remand. Public Counsel argues that these facts are not relevant because they did not occur in the test year.

The test year for this case is the year ending March 31, 1996, as updated through May 31, 1996. The test year is defined as the period of time for which relevant data is collected so that the cost of services and the total company revenue responsibility may be assigned to individual classes for that period of time. The class cost of service studies performed by the parties is the starting point for allocating the total company revenue responsibility to individual classes. The application of various methodologies for allocation of costs is a function completed as part of the class cost of service studies. The Commission must decide the first two issues, the allocation of service, meter and regulator costs and the allocation of main costs, for use in the class cost of service study.

The third issue on remand is whether the Commission should rely on some or all of any party's class cost of service study. The fourth substantive issue relates to shifts in revenue responsibility between the rate classes. The test year is needed for the first two substantive issues to define the period in which costs will be examined. The test year is relevant only to provide a frame of reference for which costs were examined in the class cost of service studies. The test year is not directly relevant to the issue of whether the Commission orders any shifts in revenue responsibility between the rate classes. Evidence that relates to something that occurred outside of the test year may be relevant to the third and fourth issue in this case. Therefore, any relevant information, even if it arises outside the test year, should be available to the Commission for consideration in deciding those issues. *UCCM*, 585 S.W.2d at 56.

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Public Counsel's argument that the specific portions of testimony cited in its motion should be stricken because it includes facts outside of the test year is incorrect. The Commission may consider any relevant evidence; that is, any evidence which tends to prove or disprove a fact in issue. *Oldaker v. Peters*, 817 S.W.2d 245, 250-251 (Mo. banc 1991); *Environmental Waste Management, Inc. v. Industrial Excavating & Equipment, Inc.*, 981 S.W.2d 607, 613 (Mo. App. W.D. 1998). The Commission may also disregard evidence if, as the trier of fact, the Commission finds that the evidence is not competent or substantial enough to be relied upon. *State ex rel. U.S. Water/Lexington v. Missouri Public Service Com'n*, 795 S.W.2d 593, 595 (Mo. App. W.D. 1990) (citing *State ex rel Marco Sales v. Public Service Commission*, 685 S.W.2d 216, 218 (Mo. App. 1984)). The Commission should consider Brad Lewis' testimony because it is offered to prove or disprove whether the Commission should order a shift in the class rate responsibility. The Commission may disagree with MGE's argument based upon the Lewis testimony, and may even reject the testimony, but the Commission is not required to strike the evidence without consideration. *State ex rel. Associated Natural Gas Co. v. Public Service Com'n*, 706 S.W.2d 870 (Mo. App. W.D. 1985). Therefore, the Commission will deny Public Counsel's motion to strike specific sections of the testimony in Exhibit 182, Direct Testimony on Remand of Brad Lewis.

2. MGUA's Motion to Strike Testimony

On August 7, 2000, MGUA filed its motion to strike portions of the direct testimony on remand of Brad Lewis. MGUA objected to the following portions of Lewis' testimony:

- p. 2, line 13 through p. 3, line 4.
- p. 4, lines 4-22.
- p. 5, line 1.
- p. 7, line 19 through p. 13, line 12.
- p. 13, line 23, beginning with "However" through p. 13 [sic], line 2.

MGUA amended its motion at the beginning of the hearing on August 8, 2000, to add page 14, lines 5-14. As support for its motion to strike these portions of Mr. Lewis' testimony, MGUA emphasized the portions of this case on remand involving the class cost of service allocations and the involvement of the test year as a part of the class cost of service study. MGUA stated that events occurring well after the close of the test year and the known and measurable period have no bearing on the proper class cost of service allocations for the test year. For the same reasons as stated Section II.A, in regard to Public Counsel's motion to strike, the Commission finds that, after reviewing the motion and arguments on the record, that MGUA's motion to strike testimony should also be denied.

E. Exhibits 182 and 184

Exhibit 182, Direct Testimony on Remand of Brad Lewis, and Exhibit 184, Rebuttal Testimony of Ryan Kind, were offered into evidence during the hearing held in this case on August 8 and 9, 2000. Both Exhibit 182 and 184 were received subject to the motions to strike and objections that were identical to Public

Counsel's and MGUA's motions to strike pending before the Commission at the time of the hearing. The Commission has denied both Public Counsel and MGUA's motions to strike, and therefore, the identical objections raised by Public Counsel and MGUA in relation to Exhibit 182 and the objections raised by MGUA in relation to Exhibit 184 are overruled. Exhibits 182 and 184 are admitted into the record without further reservation.

II. Discussion of Issues on Remand

A. Allocation of Costs for Services, Meters and Regulators

The first issue identified by the parties in the Statement of Issues filed July 18, 2000, was

How should the Commission allocate MGE's costs attributable to its service lines, meters and regulators among the various rate classes?

This issue was previously identified in the *Hearing Memorandum* filed October 7, 1996,³ and may be referenced in earlier testimony as "Allocation of Costs for Services, Meters and Regulators." *Hearing Memorandum* filed October 7, 1996, Issue No. 6.1.1 at p. 40.

In its statement of position, MGE stated that the Commission should decide this issue in a manner that is consistent with the percentage increases to the customer classes as prescribed in the Commission's original orders. In the testimony filed on remand, MGE's expert witness testified that he continued to support MGE's original class cost of service and allocation methods submitted by MGE's original expert witness, Dennis S. Gillmore.⁴ In the testimony submitted in the original case, MGE stated that it allocated its customer costs for service lines, meters, and regulators on the basis of the relative number of customers in each class with the larger customers weighted to recognize their higher level of customer costs.

MGUA agreed that these costs should be allocated based upon Mr. Gillmore's Cost of Service Study. MGUA's Statement of Position stated that Mr. Gillmore's class cost of service study properly treated meter costs as customer costs because the number of meters is clearly related to the number of customers. MGUA argued that service lines and regulators are similarly related to the number of customers and thus also should be similarly allocated.

Staff's statement of position stated that it continues to support its allocation of the costs for service lines, meters, and regulators and maintains that its method is an acceptable allocation of these costs to various classes, while the method of allocation used by MGE is flawed. Public Counsel took a position in support of Staff's method for allocating services, meters and regulators.

³ This Hearing Memorandum identified the issues for decision in the original case.

⁴ MGE Witness Brad Lewis adopted the pre-filed testimony of Dennis S. Gillmore for the purpose of cross-examination because Mr. Gillmore was no longer employed by MGE at the time of the remand hearing.

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B. Allocation of Costs for Mains

The second issue identified by the parties in the Statement of Issues filed July 18, 2000, was

How should the Commission allocate MGE's costs attributable to its mains among the various rate classes?

This issue was previously identified in the *Hearing Memorandum* filed October 7, 1996, and may be referenced in earlier testimony as "Allocation of Costs for Mains." *Hearing Memorandum*, October 7, 1996, Issue No. 6.1.2 at pp. 40-41.

In its statement of position, MGE stated that the Commission should decide this issue in a manner that is consistent with the percentage increases to the customer classes as prescribed in the Commission's original orders. MGE's expert witness on remand testified that he continued to support MGE's original class cost of service and allocation methods as submitted by MGE's original witness, Dennis S. Gillmore. In the testimony submitted in the original case, MGE stated that it allocated its customer costs for mains based upon the relative number of customers by class and the relative peak demands by class.

In its Statement of Position, MGUA stated that the costs of services, meters and regulators should be allocated based upon MGE's class cost of service study.

Staff stated that it supported its allocation of the costs for mains. Staff calculated its allocation of costs by 1) estimating the relationship of distribution main cost to length and peak day volumes using replacement cost data provided by the company, 2) separating those costs into a stand-alone component and an integrated system component, and 3) developing allocation factors for each customer class based on the percentage of total cost attributed to each class as stand-alone and integrated system components. Staff maintains that its method is an acceptable allocation of the costs for mains to various classes.

Public Counsel utilized a modified Relative System Utilization Method (RSUM) method of allocation, which uses increments of the monthly maximum demands of each customer class in conjunction with the known cost-capacity relationships to allocate the costs of the distribution mains. Public Counsel stated that, on the whole, its methodology is the most reasonable because it is consistent with the actual cost/capacity relationship of distribution mains, equitably takes into account the benefits resulting from year-round use of the delivery function of the system, and does not artificially or incorrectly separate portions of the costs into "two different causes," but rather allocates all of those costs on one consistent basis. Public Counsel further adapted the modified RSUM method of allocating distribution mains by accounting for the economies of scale and utilizing monthly non-coincident peak day demands instead of calculating monthly average daily demands as recommended in the modified RSUM method.

C. Class Cost of Service Results

The third issue identified by the parties in the Statement of Issues filed July 18, 2000, was

Should the Commission rely upon some or all of a particular party's cost of service study (studies were performed by MGE, Staff and OPC) as a basis for the Commission's determination of the costs attributable to the various rate classes?

This issue was previously identified in the *Hearing Memorandum* filed October 7, 1996, and may be referenced in old testimony as "Class Cost of Service Results." *Hearing Memorandum*, October 7, 1996, Issue No. 6.1.3 at pp. 41-42.

MGE stated that the Commission need not rely on any particular study entirely and that the Commission's decision on allocating class revenue responsibility need not be based solely on class cost of service study determinations. MGE's witness on remand testified that MGE's original class cost of service was based upon superior methods but that it is only one factor to consider in establishing a rate design. MGE urged the Commission to decide this issue in a manner that is consistent with the percentage increases to the customer classes as prescribed in the Commission's original orders.

MGUA's Statement of Position stated with respect to this issue that the Commission should rely on MGE's class cost of service study as an appropriate indicator for the adjustment of class revenue responsibility.

Staff stated that it supports its class cost of service study. Staff noted that the Commission can use all or part of the various cost of service studies filed in this case where it finds the allocation methods used in such studies to be acceptable as an indication of the costs attributable to the various classes. Staff asserted that the Commission should not rely solely on class cost of service results, however, as such studies are only informed judgments applied to estimate class cost responsibility. Staff stated that other factors such as rate impact should be considered when determining class revenue requirements.

Public Counsel stated that the Commission should rely on Public Counsel's class cost of service study as the basis for its determination of costs attributable to the various customer classes. Public Counsel stated that its study uses allocators that either directly assign costs to the various customer classes or assign costs to classes in the manner that best reflects each class' role in causing the various costs.

D. Class Rate Increases

The fourth issue identified by the parties in the Statement of Issues filed July 18, 2000, was

Should the Commission authorize any shifts in revenue responsibility between rate classes prior to authorizing increases to each of the various rate classes attributable to this case? If such revenue responsibility shifts are made, or if such shifts are not made, in what manner should the Commission increase the rates of the various rate classes?

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This issue was previously identified in the *Hearing Memorandum* filed October 7, 1996, and may be referenced in old testimony as “Class Cost of Service Results.” *Hearing Memorandum*, October 7, 1996, Issue No. 6.2.4 at p. 46.

In its initial case, MGE recommended that the Commission should look at the cost of serving each class of customer in determining what rate structure the Commission should direct MGE to adopt. On remand, MGE changed its position and now argues that no class rate increase should occur. MGE stated that percentage increases authorized in this remand should be identical to those previously authorized by the Commission.

Staff recommended that a shift in class revenue requirement be made in the direction indicated by the class cost of service results shown in Staff's study. However, Staff stated that, given the magnitude of the initial revenue shifts indicated by the class cost of service study, consideration should be given to the overall impacts that will result with the addition of the revenue requirement. Staff noted that the Commission, in a series of three orders issued January 22, February 28, and March 18, 1997, determined the adjusted revenue requirement of \$8,847,088. Staff stated that the class revenue responsibility that resulted from these three orders moved toward its class cost of service result by giving a higher-than-system-average increase to the Residential Class and a lower-than-system-average increase to the LVS Class. Staff stated that the revenue shifts that occurred as a result of the Commission's three orders are consistent with Staff's position regarding class revenue shifts and that the Commission, in its order on remand, should continue the same revenue responsibility. Staff recommended that no additional revenue shifts be included in the order on remand.

Public Counsel objected to any additional evidence being admitted into the record in this hearing on remand and recommended that an equal percentage increase be implemented based upon evidence already in the record. Public Counsel recommended that there be no class revenue responsibility shifted to the residential customer class.

MGUA stated that the Commission should seek to bring customer class revenues into line as much as possible with the MGE study so that interclass discriminations and preferences are minimized or removed. Once class revenues are brought into line with class costs, MGUA recommended that an equal percentage increase should be used to recover increased costs associated with the distribution system.

E. Post-January 22, 1997 Evidence on Remand

The fifth issue identified by the parties in the Statement of Issues filed July 18, 2000, was

In reaching its decision in this remand proceeding, should the Commission consider events related to MGE's rates which have taken place since the Commission issued its original order on January 22, 1997, including but not limited to the Commission's decision in a subsequent general rate case (Case No. GR-98-140) and the impoundment of funds in the

Circuit Court of Cole County, Missouri, arising from an appeal of the original order in this proceeding?

This issue was not previously included in the *Hearing Memorandum* filed October 7, 1996, and was not part of the issues remanded by the circuit court.

MGE stated that the Commission should consider events related to MGE's rates that have taken place since the Commission issued its original order on January 22, 1997. MGE stated that the Commission is obligated to consider all relevant factors in reaching a decision. MGE noted that certain subsequent events, including actions taken by the Commission itself and the consequences of those actions, are relevant and have a direct bearing on the decision the Commission should reach in this remand proceeding.

Staff stated that it is permissible for the Commission to consider events which occurred after the original order of the Commission dated January 22, 1997. This is especially true, Staff stated, in the unique circumstances of this case wherein the later events are particularly relevant and material and involve regulatory action. Staff stated that, specifically, the Commission's Order Granting in Part and Denying in Part Applications for Rehearing dated February 28, 1997, and the Commission's Order Granting Motion for Clarification dated March 18, 1997, are particularly relevant since these orders resulted in an additional rate increase for all classes except the LVS Class.

Public Counsel stated that the Commission should not consider events related to MGE's rates that have taken place since the Commission issued its original order on January 22, 1997. Public Counsel stated that the Commission's decision regarding class revenue responsibility should be based upon factors that occurred during the historical test year ordered by the Commission. Public Counsel noted that including items well beyond the end of the test year would be poor regulatory policy and may well be inconsistent with the law. Public Counsel argued that resolution of how to treat the funds impounded by the circuit court should be left to the circuit court to resolve.

MGUA stated that this question is not a proper issue.

F. Should the Commission Reach Same Result on Class Rate Responsibility as in the Original Order issued January 22, 1997?

The sixth issue identified by the parties in the Statement of Issues filed July 18, 2000, was

Should the Commission reach the same result on class revenue responsibility that it did in its original order (i.e., that the revenue requirement increase shall be allocated among the customer classes as 68.22 percent for Residential; 0.01 percent for Un-metered Gas Lights; 21.22 percent for Small General Service; 2.65 percent for Large General Service; and 7.90 percent for Large Volume Service) after considering all the evidence and arguments in this remand proceeding?

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This issue was not previously included in the *Hearing Memorandum* filed October 7, 1996, and was not part of the issues remanded by the circuit court.

MGE stated that the Commission should reach the same result on class revenue responsibility that it did in its original order after considering all the evidence and arguments in this remand proceeding. Staff concurred with MGE, stating that class revenue responsibilities were determined in a series of three Commission orders: the Commission's Report and Order issued January 22, 1997, the Order Granting in Part and Denying in Part Applications for Rehearing issued February 28, 1997, and the Order Granting Motion for Clarification issued March 18, 1997. Staff maintained that these three orders resulted in the following class revenue requirements: 68.22 percent for RES; 0.01 percent for UGL; 21.22 percent for SGS; 2.65 for LGS; and 7.90 percent for LVS. Staff stated that the resulting revenue responsibility moved toward its class cost of service results by giving a higher-than-system-average increase to the RES Class and a lower-than-system-average increase to the LVS Class. Staff noted that these revenue shifts are consistent with Staff's position regarding class revenue shifts and should be continued by the Commission in its order on remand.

Public Counsel stated that the Commission should accept Public Counsel's proposal to give each class an equal percentage increase.

MGUA stated that the Commission's prior decision was held unlawful. MGUA also stated that this question in this issue is not a proper issue nor is it a proper statement of the issue.

III. Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission has reviewed and considered all of the evidence and arguments presented by the various parties and intervenors. Because of the volume of material presented to the Commission, the Commission may not address some evidence and positions on certain issues. The failure of the Commission to mention a piece of evidence or the position of a party indicates that, while the evidence or position was considered, it was not found to be necessary to the resolution of the issue.

A. The Parties

MGE is a public utility engaged in providing gas service to the public in the State of Missouri, subject to the jurisdiction of the Commission. Section 386.250 and Chapter 393, RSMo.

Staff is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]" Section 386.071, RSMo 2000.⁵

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests

⁵ Unless otherwise specified, all statutory references herein are to the Revised Statutes of Missouri (RSMo), revision of 2000.

of the public in any proceeding before or appeal from the public service commission[.]” Sections 386.700 and 386.710.

The remaining parties are intervenors pursuant to Commission Rule 4 CSR 240-2.075 and Commission order. Kansas City is a political subdivision located within MGE's service area whose residents, in part or in whole, receives gas service from MGE. CMSU and UMKC are institutional gas customers of MGE. KC Developers is an unincorporated association of real estate development businesses which utilize gas service in MGE's service area. GSRAM is an association of former and retired employees of the Gas Service Company and MGE. Riverside is a present and historic supplier of natural gas transportation services to MGE in the Kansas City, Missouri, metropolitan area and one of only two material transporters of natural gas to MGE. Mid-Kansas Partnership is an affiliate of Riverside and a present and historic supplier of natural gas to MGE in the Kansas City, Missouri, metropolitan area.

B. Background

On March 1, 1996, MGE filed tariff sheets with the Commission to increase rates for gas service provided to customers in its Missouri service area for the purpose of producing an annual increase of approximately 13.04 percent (\$34,019,650) in the Company's revenues. After an evidentiary hearing, the Commission granted MGE a revenue requirement increase of \$7,527,513 in its Report and Order issued on January 27, 1997. Each customer class was ordered to receive an equal percentage rate increase. Subsequent orders of the Commission modified the revenue requirement increase further.

MGE timely appealed the revenue requirement increase portion of the Commission's Report and Order and the circuit court upheld the Commission's Report and Order on the revenue requirement increase of \$8,847,088 on July 18, 1997. MGUA timely appealed the Commission's Report and Order based in part on the Commission's rejection of the Stipulation and Agreement regarding rate design, class cost of service studies and revenue shifts without a proper hearing. The circuit court declared the Commission's Report and Order and its subsequent orders of January 31, March 18, and March 20, 1997, unlawful, unreasonable and unconstitutional in violation of the MGUA's rights of due process and in violation of Missouri law because the rates were approved without a hearing on the rate design issues of class cost of service and revenue shifts as required by law.⁶ The circuit court remanded this case “to the Commission for action by the Commission.”

On May 10, 2000, the Commission reopened this case for further proceedings on remand relating to class cost of service and revenue shifts. The Commission identified the issues that would have been resolved by the rejected stipulation and

⁶ The circuit court also found the Commission's Report and Order, and its subsequent orders, to be unlawful, unreasonable and in violation of Missouri law because the Commission failed to rule on a legitimate and identified issue regarding gas transportation (*Hearing Memorandum*, Issue 7.5 Curtailment Plan) and remanded it to the Commission for further action. The parties informed the Commission at the remand hearing that the issue involving Tariff Sheet 68 (gas transportation) had been resolved in a subsequent MGE rate case, Case No. GR-98-140. Therefore, that issue is no longer before the Commission for decision.

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agreement as the following issues: allocation of costs for services, meters and regulators; allocation of costs for mains; class cost of service results; and class rate increases. These issues were set forth in the *Hearing Memorandum* filed by the parties on October 7, 1996, under category II. Issues, Section 6:

6. Class Cost of Service and Rate Design

- 6.1 Class Cost of Service Study**
 - 6.1.1 Allocation Of Costs For Services, Meters, And Regulators**
 - 6.1.2 Allocation Of Costs For Mains**
 - 6.1.3 Class Cost of Service Results**

6.2 Rate Design

...

6.2.4 Class Rate Increases

* * *

C. Class Cost of Service Study

Class cost of service studies are used as the starting point in determining the proper level and structure of each rate for each customer classification. Class costs of service studies provide the Commission with a measure of relative class cost responsibility for the overall revenue responsibility. In the class cost of service study, costs are allocated to customer classes based upon functional factors that are common to all classes and measurable for each class.

MGE, Staff, and Public Counsel each prepared its own class cost of service study based upon the test year ending March 31, 1996, and updated for known and measurable changes through May 31, 1996. The customer classes used in all three class cost of service studies included RES, UGL, SGS, LGS and LVS. The costs were allocated into the following functional categories:

- Distribution Mains
- Distribution Measuring and Regulating
- Distribution Meters
- Distribution Regulators
- Distribution Services
- Customer Related
 - Meter Reading
 - Customer Billing
- Assigned - Residential and Small General Service
- Assigned - Large Volume and Large General Service
- Revenue Related

The only costs remaining as substantive issues in this hearing on remand are the allocation of costs for Distribution Services, Meters and Regulators and the allocation of costs for Distribution Mains.

D. Allocation of Costs for Services, Meters and Regulators

Service is the dedicated section of pipe that connects a single customer to the company's system of distribution mains. Meters are instruments for measuring and indicating or recording the volume of gas that has passed through it to a customer.⁷ Regulators are devices that maintain pressure in a fluid flow gas line.⁸

MGE's and Staff's allocators for services, meters, and regulators were both developed using weighted customer costs, or those costs which vary based upon the number of customers. Customer weight is the ratio of the average cost of services, meters and regulators for customers in a particular class to the average cost of services, meters and regulators for a customer in the smallest rate class. The service, meter and regulator costs for a typical customer in each class was provided by MGE in its response to Staff Data Request #4105. These service, meter and regulator costs were averaged over each customer rate class and the weights were computed based upon the average cost of each class. Staff's allocators for service, meters, and regulators are included in Revised Schedules 6, 7 and 8 attached to the Supplemental Direct Testimony of Daniel I. Beck.

Although MGE's method of calculating the allocation of cost for services, meters and regulators was similar to Staff's method, there was a significant difference between MGE and Staff's allocators. Errors in MGE's calculations of weighting factors as well as differences in the number of customers explain the significant difference in results. MGE's weighting factors were based on estimates for the costs to install services, meters and regulators. MGE chose to aggregate the separate estimates for service, meter and regulator costs and then calculated a single set of weighting factors, causing the resulting estimates to vary significantly. Other errors in MGE's calculations of weighting factors included the transposition of the total replacement cost of service, meters and regulators for the small industrial and large commercial subclasses and the use of arbitrary rounding procedures found in MGE's work papers.

MGUA offered its own expert testimony in support of MGE's allocators but it did not offer any evidence supporting any allocators different than those offered by MGE, Staff or Public Counsel.

E. Allocation of Costs for Mains

A distribution main is a section of pipe which distributes the gas to several customers. Because MGE's system of mains is a shared system, the costs of the distribution mains must be allocated to the customer classes based on some perceptible measure of the cost caused by each class, or of the benefits received by each class, or some combined measure of costs and benefits to each class. There is no standard method for classifying costs associated with a shared distribution asset.

Predefined categories of costs have traditionally been used in allocating costs that arise from different underlying sources in a shared distribution system. The

⁷ *Glossary for the Gas Industry*, 4th Ed., (The American Gas Association, Statistics and Related Economics Committee, Arlington, VA) 1986.

⁸ *Id.*

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traditional cost categories include energy-related, demand-related and customer-related costs. Energy-related costs usually include the cost of fuel. These costs are also referred to as commodity costs. Demand-related costs usually include those costs that vary proportionally with some measure of demand, such as volume used.⁹ Demand costs, also referred to as capacity costs, typically relate to the maximum delivery requirements of the system. As noted earlier, customer costs refer to those costs related to the number of customers on a system. Some costs are assigned by the process of elimination. As an example, the portion of costs which is found not to be energy-related or demand-related is often categorized as customer costs. Another category used in categorizing shared costs is non-demand costs. Non-demand costs are used to describe costs that do not vary proportionally with some measure of demand, but which also do not depend directly on the number of customers.

MGE's minimum systems¹⁰ method distributed the historical cost of mains to customer classes based upon the relative number of customers by class served by the minimum facilities system and the relative peak demands by class. The customer-related costs were allocated to the classes based on weighted customer allocators and the demand-related costs were allocated based on adjusted peak demand. MGE used a weighted customer calculation where the weighting factor was based on the replacement cost of the services, meters and regulators, not mains. This minimum systems method only allocates the cost required to meet the demands of the smallest customer regardless of the rate class. The problem with the minimum system approach is that there is no way to determine the cause of costs that are above those required by a minimum system. In addition, the minimum systems method has no causal links to either customer size or customer length, and therefore allocates too much costs to the smaller customers, particularly RES and SGS customers.

Public Counsel utilized a modified RSUM method of allocation, which used increments of the monthly maximum demands of each customer class in conjunction with the known cost-capacity relationships to allocate the costs of the distribution mains. Public Counsel's known cost-capacity relationships in allocating the costs of the distribution mains related to the economic concept of economies of scale. In this context, economies of scale occur when costs rise more slowly than the capacity of the main increases. For this reason, Public Counsel excluded all classes except for RES and SGS classes from the costs associated with mains having diameters less than four inches. Public Counsel also directly assigned the two-inch diameter main to the RES and SGS customer classes.

Public Counsel's calculations include several errors including the fact that monthly peak demands were based on incorrect monthly peak day normal weather, the incorrect calculation of the ratio of peak to average usage, and an estimated cost curve that did not take into account the fact that some costs are not related to

⁹Volumes are often measured in Mcf, or the measurement "thousands per cubic feet."

¹⁰ Minimum systems refers to the smallest amount of service lines facilities needed to serve customers the minimum amount of gas through the system.

capacity. Public Counsel's estimated cost curve also failed to account for the fact that for each diameter of main which makes up MGE's distribution system, the lengths vary significantly. Cost of mains that do not vary with the size of pipe being installed include costs related to right-of-way, digging the trenches, laying the pipe, restoring the surface to its original condition and connecting service lines to the main.

Staff used an integrated systems component of mains. The integrated systems component of mains was defined as the amount of distribution system required to meet the integrated demands of all customers. Staff's method of allocation used three steps: 1) estimating the relationship of distribution main cost to length and peak day volumes using replacement cost data provided by the company, 2) separating those costs into a stand-alone component and an integrated system component, and 3) developing allocation factors for each customer class based on the percentage of total cost attributed to each class as stand-alone and integrated system components. Staff used replacement cost data as one of the primary ways of addressing the effects of inflation.

Staff's stand-alone system component allocated costs incurred to fully meet the demands the typical customer in a particular rate class. The costs that are not peculiar to a specific customer class are considered part of the integrated system component. The stand-alone component is calculated by solving the replacement costs function for mains by using the typical diameter of pipe for each rate class as the independent variable. The typical diameter of pipe is the smallest size of pipe required to meet that customer's peak demand. The cost per unit length multiplied by the total length of main serving each class is the class' total stand-alone cost. Each class' stand-alone cost was divided by these costs summed over all classes to determine the percentage of stand-alone costs allocated to each rate class.

Staff's stand-alone component of its distribution main costs allocator accounted for economies of scale by including the costs that vary with the length of the pipe installed (customer pipe length). The length of the stand-alone component was allocated to the customer classes based on weighting factors. The relative weight of the classes was estimated based upon a typical size of a customer's parcel information and the calculation of the typical frontage length of that parcel.

The impact of the costs allocated to the distribution mains is directly proportional to the computed allocators: Public Counsel's equals .5425, Staff's equals .6252 and MGE's equals .6839.

F. Class Cost of Service Results

There is no scientific process for determining or establishing cost of service for the various customer classes. The method to establish the appropriate allocations and classifications of costs which are part of the class cost of service study are subjective and based upon the judgment of the person or persons who are preparing the class cost of service study. MGE's expert witness testified that all of the studies presented to the Commission are valid, but MGE's expert witness supports its own study as the most accurate study.

In determining customer class responsibility for the revenue's needed to provide the utility with a fair return on its investment, the Commission has used cost

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of service studies in the past as a starting point. The Commission finds that it must also ensure that costs have been allocated to the different classes in a fair and reasonable manner where costs are not unfairly over-allocated to one class over another.

G. Class Rate Increases

In addition to class cost of service studies, the parties requested the Commission consider the following in determining any class revenue responsibility shifts. Historical and intervening impacts on class revenue responsibility refer to the impact of the precedent and subsequent Commission orders that have reflected a shift in class revenue responsibility in addition to the impact that would occur as a result of this Report and Order. These Commission orders may have arisen historically (before the application for rate increase was filed in this case on March 1, 1996), or intervening (since the Commission’s first Report and Order was issued on January 27, 1997).

One historical impact cited arose from the Commission’s Order effective October 15, 1993, in Case No. GR-93-240. In that order, revenue responsibility amounting to \$2,118,085 was shifted to the residential and small commercial classes. The intervening impacts on class rate revenue responsibility include the Commission’s Order Granting in Part and Denying in Part Applications for Hearing, issued February 28, 1997, and the Commission’s Order Granting Motion for Clarification, issued March 18, 1997, both issued in Case No. GR-96-285. These intervening orders resulted in an additional \$1,319,575 revenue increase shift to the RES, SGS and LGS classes, but not to the LVS class. The combined impact of these historical and intervening revenue increases by customer class is shown in the following table:¹¹

Historical and Intervening Impact on Class Revenue Responsibility					
	Total	Residential	Small General Service	Large General Service	Large Volume Service
GR-93-240 \$2,118,085 increase	9.59%	11.59%	16.16%	.91%	-9.79%
GR-96-285 \$7,527,513 increase	6.52%	6.52%	6.52%	6.52%	6.52%
GR-96-285 \$1,319,575 increase	1.14%	1.20%	1.37%	1.15%	0.00%
Total	17.25%	19.31%	24.05%	8.58%	-3.27%

¹¹Table is a combination of similar tables prepared by MGE’s expert witness Brad Lewis and Staff’s expert witness Daniel I. Beck.

Additional factors that the parties proposed for the Commission's consideration along with all the relevant evidence include consumption characteristics¹² (effects on low income customers), economic factors, current rate structures,¹³ value of service,¹⁴ rate affordability,¹⁵ customer service quality,¹⁶ historical rates,¹⁷ the concept of gradualism to avoid or minimize potentially disruptive rate shifts or rate shock,¹⁸ and the magnitude of the required increases or the overall rate impact¹⁹ of the increase in the revenue requirement.

IV. Conclusions of Law

The Missouri Public Commission has reached the following conclusions of law.

A. Jurisdiction

The Missouri Public Service Commission has jurisdiction over MGE's services, activities, and rates pursuant to Section 386.250 and Chapter 393, RSMo.

The Commission rendered its initial decision on MGE's rate increase request on January 22, 1997, pursuant to its jurisdiction. Pursuant to Section 386.510, RSMo, MGE appealed the revenue requirement increase of \$8,847,088 and MGUA appealed the rate design and class revenue responsibility portion of the Commission's report and order to the circuit court. The circuit court affirmed the Commission's decision regarding the revenue requirement and reversed the Commission's decision involving rate design and class revenue responsibility and remanded this issue to the Commission. The circuit court granted a stay

¹² Consumption characteristics refers to the fact that frequently lower income customers use more gas for heating because the homes they heat are often older and more poorly insulated, thereby causing those people who can least afford it, to consume more gas to achieve the same degree of heating as newer, better insulated homes.

¹³ Current rate structures refer to the relationship of rates between the customer classes before the Commission approves a change in the rate design.

¹⁴ Value of service was one of the factors that two witnesses, Kind and Lewis, testified should be considered along with class cost of service study results in determining the class revenue responsibility for each customer class. However, no definition of this phrase was given in evidence. Therefore, the plain meaning of the phrase should be used. Value is defined as "1. An amount, as of goods, services, or money, considered to be a fair and suitable equivalent for something else; a fair price or return. 2. Monetary or material worth," The American Heritage Dictionary of The English Language 1972 (3rd Ed. 1996).

¹⁵ Rate affordability refers to the ability of the customer to pay the rates set.

¹⁶ Customer service quality refers to the level of customer service received by each of the customer rate classes.

¹⁷ Historical rates refer to past rate designs and the class revenue responsibility that have existed in the past.

¹⁸ The concept of gradualism refers to the movement of class cost responsibility to cost-based rates on an incremental basis to avoid or minimize potential of rate shock when customers are faced with large utility rate increases all at one time.

¹⁹ The magnitude of the required increases or the overall rate impact of the increase in the revenue requirement refers to the possibility that large rate increases could have the effect of rate shock to customers if they are faced with a large utility rate increase at one time.

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impounding those funds representing the difference between the portion of the rate paid by large volume users before the Commission's January 22, 1997 decision, and that portion of the rate due from large volume users after the Commission's Report and Order was issued.

MGE appealed the circuit court's subject matter jurisdiction to the Court of Appeals, which affirmed the circuit court's jurisdiction and its decision. In its decision, the Court of Appeals stated

Upon remand, the Commission will determine how much of that aggregate revenue due MGE would be paid by Midwest. By issuing the stay order, the circuit court was allowing MGE to collect revenue at the newer higher rate, pending the outcome of further hearings, on the condition that it impound the difference between that higher rate and the lower rate then lawfully in existence.

Midwest Gas User's v. Public Service Com'n, 996 S.W.2d 608, 617 (Mo. App. W.D. 1999). After the appeal became final, jurisdiction was returned to the Commission for a hearing on rate design and class revenue responsibility.

1. Post-January 22, 1997 Evidence on Remand

On remand, the parties have raised additional questions regarding substantive procedure. One of the questions posed by the parties in the Statement of Issues filed on July 18, 2000, was

In reaching its decision in this remand proceeding, should the Commission consider events related to MGE's rates which have taken place since the Commission issued its original order on January 22, 1997, including but not limited to the Commission's decision in a subsequent general rate case (Case No. GR-98-140) and the impoundment of funds in the Circuit Court of Cole County, Missouri, arising from an appeal of the original order in this proceeding?

This question has been adequately addressed in Section II, Pending Motions, *supra.*, in response to Public Counsel's and MGUA's motions to strike testimony.

In *State ex rel. Utility Consumers Council of Missouri, et al. v. P.S.C.*, 585 S.W.2d 41, 56 (Mo. banc 1979), the Supreme Court ruled that the Commission is required to consider all relevant factors in setting rates. Numerous other cases indicate that the Commission must consider all relevant facts in reaching its decisions. *Oldaker v. Peters*, 817 S.W.2d 245, 250-251 (Mo. banc 1991). The Commission's decision must rely only upon competent or substantial evidence. *State ex rel. U.S. Water/Lexington v. Missouri Public Service Com'n*, 795 S.W.2d 593, 595 (Mo. App. W.D. 1990) (citing *State ex rel Marco Sales v. Public Service Commission*, 685 S.W.2d 216, 218 (Mo. App. 1984)).

The Commission must consider all of the available and relevant facts to carry out its regulatory authority. Therefore, the Commission will consider evidence relating to events occurring after the Report and Order issued.

2. Should Commission Reach the Same Result on Class Rate Responsibility as in the Original Order issued on January 22, 1997?

If the results at the end of this hearing are the same as the Commission's original Report and Order issued January 22, 1997, that decision shall be based upon the original record and such additional evidence admitted at the remand hearing that is found to be both competent and substantial. The question posed by the parties in the Statement of Issues is a narrower version of the ultimate question to be answered by the decision, which is "What should the class rate responsibility be for each customer class?" That is the question the Commission addresses as it considers class revenue responsibility.

In its initial brief as well as its reply brief, MGUA suggests that the Commission is somehow prohibited from reaching the same decision that it reached the first time. At the circuit court, the Commission admitted that it had erred by failing to grant a hearing on the issues rejected in the parties' Stipulation and Agreement. The Commission has now, on remand, provided due process to all the parties on the issues remanded. To rule out one of the possible results without consideration of the evidence in the record would itself be a violation of due process. The Commission will consider all the relevant evidence and reach a decision based on the competent and substantial evidence.

MGUA asserted in their objections at hearing that the circuit court found the Commission's previous report and order "unlawful," and because any decision in this case now would effectively be retroactive ratemaking, the Commission was only required by the circuit court to hold a due process hearing but not to make any decision. The Commission concludes that the circuit court would not issue a remand to the Commission "for action by the Commission" if no further decision by the Commission were necessary. The Court of Appeals did not agree with MGUA either, as noted from the text cited earlier in Section IV.A., "Upon remand, the Commission will determine how much of that aggregate revenue due MGE would be paid by Midwest." *Midwest Gas User's v. Public Service Com'n*, 996 S.W.2d 608, 617 (Mo. App. W.D. 1999). The Commission's Report and Order will be limited to those issues which were subject to the rejected Stipulation and Agreement, as remanded by the circuit court and the Commission will consider all of the evidence relevant to those issues.

B. Burden of Proof

Section 393.150.2 provides in part, "At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

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C. Applicable Statutes and Legal Standards

The Missouri Public Service Commission was created by the General Assembly in 1913. *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979). The General Assembly delegated to the Commission the police power to establish utility rates, subject to judicial review of the question of reasonableness. *State ex rel. City of Harrisonville v. Public Service Commission of Missouri*, 291 Mo. 432, 236 S.W. 852 (1922); *City of Fulton v. Public Service Commission*, 275 Mo. 67, 204 S.W. 386 (1918), *error dis'd* 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Public Service Commission of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Public Service Commission of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd* 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

The Commission's purpose is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity. *Id.*; *May Dep't Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (1937). While "the dominant thought and purpose of the policy is the protection of the public . . . the protection given the utility is merely incidental," *State ex rel. Crown Coach Co. v. Public Service Commission*, 238 Mo. App. 287, ___, 179 S.W.2d 123, 126 (1944), the Commission must also permit the utility to recover a "just and reasonable" return on the assets it has devoted to the public service. *Utility Consumers' Council*, 585 S.W.2d at 49. "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment."

Section 393.130, in pertinent part, requires a utility company's charges to be just and reasonable and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine just and reasonable rates. Section 393.270 provides in paragraph 4 that in determining the price to be charged, "the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question" The courts have held that this statute means that the Commission's determination of the proper rate must be based on consideration of all relevant factors. *State ex rel. Missouri Water Co. v. Public Service Comm'n*, 308 S.W.2d 704, 719 (Mo. 1957); *State ex rel. Utility Consumers Council of Missouri, et al. v. P.S.C.*, 585 S.W.2d 41, 56 (Mo banc 1979).

The Commission has considerable discretion in rate setting due to the inherent complexities involved in the rate setting process. *State ex rel. Associated Natural Gas Co. v. Public Service Commission of Missouri*, 706 S.W.2d 870, 880 and 882 (Mo. App. 1985); *Missouri Gas Energy v. Public Service Commission*, 978 S.W.2d 434, 440 (Mo. App. W.D. 1998); and *State ex rel. Office of the Public Counsel v. Public Service Commission*, 938 S.W.2d 339, 344 (Mo. App. W.D. 1997). The Supreme Court has found that the reasonableness of the rate design in establishing rates is for the Commission's determination after a full hearing. *State ex rel. Monsanto v. Public Service Comm'n of Missouri*, 716 S.W.2d 791, 794 (Mo. banc 1986). Further, the Commission can select the methodology it will follow when setting rates. *State ex. rel. U.S. Water/Lexington v. Public Service Comm'n*, 795 S.W.2d 593, 597 (Mo. App. W.D. 1990).

Class cost of service is often considered a starting point in quantifying what part of the revenue responsibility is afforded to each customer class. *Shepherd v. City of Wentzville*, 645 S.W.2d 130, 133 (Mo. App. E.D. 1982). Other factors should be considered when establishing rates. *State ex rel. Associated Natural Gas Co. v. Public Service Commission of Missouri*, 706 S.W.2d 870, 879 (Mo. App. 1985) (citing *Southwestern Bell Telephone Company v. Arkansas Public Service Commission*, 593 S.W.2d 434, 445 (Ark. 1980); *Shepherd v. Wentzville*, 645 S.W.2d 130 (Mo. App. 1982); *State ex rel. City of Cape Girardeau v. Public Service Commission*, 567 S.W.2d 450 (Mo. App. 1978); *Midwest Gas Users' Ass'n v. State Corp. Com'n*, 595 P.2d 735 (Kan. App. 1979); *Central Maine Power Company v. Public Utilities Commission*, 382 A.2d 302 (Me. 1978); *St. Paul Area Chamber of Commerce v. Minn. Public Service Commission*, 251 N.W.2d 350 (Minn. 1977); and *American Hoechst Corporation v. Department of Public Utilities*, 399 N.E.2d 1 (Ma. 1980).

Class costs of service studies are often considered more art than science. *Associated Natural Gas Co.*, 706 S.W.2d at 880 (citing *United States v. Federal Communications Commission*, 707 F.2d 610, 618 (D.C. Cir. 1983)). There can be more than one valid answer. All of the studies could be valid but have different features for consideration. Therefore, it is left to the Commission to evaluate the testimony of expert witnesses and accept or reject any or all of any witness's testimony. *Associated Natural Gas Co.*, 706 S.W.2d at 880 (citing *In Re Permian Basin Area Rate Cases*, 390 U.S. 747, 800, 88 S.Ct. 1344, 1377, 20 L.Ed.2d 312, ____ (1968)).

D. Rate Designs, Class Cost of Service and Related Revenue Shifts

1. Allocation of Costs for Services, Meters and Regulators

One of the remaining costs allocations for the Commission to consider is the cost of service lines, meters and regulators. MGE's and Staff's expert witnesses used similar methods to determine the allocation of costs for services, meters and regulators. Public Counsel supports Staff's method of allocating costs for services, mains, and regulators. No other calculation methods were offered. Therefore, the Commission concludes that calculating weighted customer numbers is a fair and reasonable method for allocating costs of distribution service, meters and regulators using replacement costs rather than historical costs based upon the opinion of those expert witnesses who testified on behalf of Staff and Public Counsel because the use of replacement costs addresses inflation related to these costs. Therefore, the Commission finds that the allocators for services, meters and regulators, submitted by Staff's expert witness, Daniel I. Beck in Exhibit 132, Supplemental Direct Testimony, and specifically set out in Revised Schedules 6, 7, and 8, are fair and reasonable.

2. Allocation of Costs for Mains

The other cost allocation to be determined is for the cost of distribution mains. The parties' expert witnesses all spent a considerable amount of time in rebuttal, surrebuttal and cross-examination testimony attempting to convince the Commission that their method for the allocation of the cost of mains is the appropriate method and that the other cost of service studies are flawed or incorrect. MGUA's

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expert witness continues to support the allocation method employed by MGE’s expert witnesses.

The minimal systems method for allocation of cost for distribution mains utilized by MGE’s expert witness Dennis S. Gillmore and the allocation method developed by Public Counsel’s expert witness Barry F. Hall represent the extremes in evaluation, assessment and allocation of cost for distribution mains as they relate to the class cost of service study for MGE. The effect of using the minimum systems of allocation of cost for mains inflates the level of customer-related costs, resulting in an over-allocation of cost to small customers (residential and small general service). Application of Public Counsel’s modified RSUM method of allocating costs of distribution mains results in an over-allocation of costs to LVS customers. The impact of the costs allocated to the distribution mains is directly proportional to the allocators as shown on the following table:

<u>Mains Allocator by Party Cost of Service Study</u>	
Public Counsel	.5425
Staff	.6252
MGE	.6839

Exhibit 134, Surrebuttal Testimony of Daniel I. Beck, p. 3, lines 16-19.

The Commission finds that the cost allocation method employed by Staff’s expert witness using stand-alone and integrated system components to develop the cost allocator for distribution mains is fair and reasonable because Staff’s method does not over-allocate costs to either the small customers or the LVS customers. In addition, Staff’s method of cost allocation for distribution mains properly takes into account economies of scale in its allocation of the stand-alone component of the distribution main cost by including the pipe diameter to serve the average or typical size of customer in each class, not just the smallest. Likewise, Staff’s method allocates costs to fully meet the demands of the typical customer in a particular rate class and properly accounts for economies of scale by including customer pipe length.

3. Class Cost of Service Results

MGE’s expert witness Brad Lewis provided the Commission with a summary of the results of the class cost of service studies showing the revenue neutral shifts in percentage of class revenues that are indicated by the parties’ various class costs of service studies:

	Total	Residential	Small General Service	Large General Service	Large Volume Service
MGE	0	3.96%	3.87%	-26.48%	-36.14%
Staff	0	7.29%	-17.45%	-47.85%	-2.34%
Public Counsel	0	2.26%	-17.59%	-51.51%	43.89%

If the Commission were to adopt strict cost-based rates, the Commission would adopt one of the class cost of service studies upon which to base its revenue shifts and determination of revenue neutrality. However, the class cost of service study results are but a starting point in designing rates. *Shepherd*, 645 S.W.2d at 133.

The Commission finds that it is just and reasonable to consider all relevant factors in addition to actual costs when determining the class revenue responsibility. *State ex rel. Utility Consumers Council of Missouri, et al. v. P.S.C.*, 585 S.W.2d 41, 56 (Mo. banc 1979); *State ex rel. Missouri Water Co. v. Public Service Comm'n*, 308 S.W.2d 704, 719 (Mo. 1957).

The Commission finds that Staff's class cost of service study resulted in a fair and reasonable allocation of costs because it properly took into account economies of scale in its allocation of the stand-alone component of the distribution main cost by including the pipe diameter to serve the average or typical size of customer in each class, not just the smallest. In addition, Staff's class cost of service study did not over-allocate costs to any one customer class. Therefore, the Commission will use Staff's class cost of service study as its starting point for determining class revenue responsibility.

4. Class Rate Increases

In addition to the class cost of service study, the Commission will consider all of the relevant evidence presented in this case, including facts and circumstances such as consumption characteristics (effects on low income customers), current rate structures, rate affordability, historical rates, the concept of gradualism to avoid or minimize potentially disruptive rate shifts or rate shock, and the magnitude of the required increases or the overall rate impact of the increase in the revenue requirement. The Commission finds that, given the historical and intervening factors, including the Commission's Order effective October 15, 1993, that resulted in a \$2,118,085 revenue responsibility shift to the residential and small commercial classes, and the Commission's Orders, issued February 28, 1997, and March 18, 1997, resulting in an additional \$1,319,575 revenue shift to the residential, small general service and large general service classes, the \$8,847,088 revenue requirement increase approved earlier in Case No. GR-96-285 shall be applied as an equal percentage increase to all customer classes. The overall impact of the rate increase is just and reasonable when applied on an equal percentage basis to all customer classes.

By adopting an equal percentage increase for class revenue responsibility, the RES and SGS customer classes of MGE, and its predecessor, will have experienced an overall rate increases of 19.31 percent and 24.05 percent, respectively, since 1993. During that same time period, the LGS customer class will only have experienced an increase of 8.58 percent, while the LVS customer class will have experienced an overall decrease of 3.27 percent in its rates. Therefore, the Commission finds that the application of an equal percentage increase for the class revenue responsibility is just and reasonable.

IT IS THEREFORE ORDERED:

1. That the Motion to Strike Portions of the Direct Testimony on Remand of MGE's Witness, Brad Lewis, filed by Office of the Public Counsel on July 26, 2000, is denied.

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2. That the Motion to Strike Testimony filed by Missouri Gas User's Association on August 7, 2000, is denied.
3. That the \$8,847,088 revenue increase granted Missouri Gas Energy in the Commission's Report and Order issued January 22, 1997, and its subsequent orders, shall be applied to the customer classes as an equal percentage increase (i.e., 68.22 percent for Residential; 0.01 percent for Un-metered Gas Lights; 21.22 percent for Small General Service; 2.65 percent for Large General Service; and 7.90 percent for Large Volume Service).
4. That all other pending motions and applications, not specifically ruled herein, are denied.
5. That all objections not specifically ruled upon at hearing, or in this Report and Order, are denied.
6. That any evidence offered but not ruled upon, or otherwise admitted into evidence, is deemed admitted.
7. That this Report and Order shall become effective on February 11, 2000.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,
concur; Murray, C., dissents with dissenting opinion attached;
certify compliance with the provisions of Section 536.080,
RSMo 2000.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

Having considered all of the evidence and arguments in this remand proceeding, I would reach a different result. An equal percentage increase is not appropriate because significant class cost of service imbalances continue to exist. I respectfully dissent from what appears to be the majority's reaffirmation of this Commission's earlier decision.

**In the Matter of Mark Twain Rural Telephone Company's Proposed
Tariff to Introduce Its Wireless Termination Service***

*Case No. TT-2001-139
Decided February 8, 2001*

Telecommunications §7. The Commission concluded that it had jurisdiction over the Wireless Termination Tariffs proposed by telephone cooperatives because the charges imposed by the proposed tariffs were in the nature of exchange access charges.

*On March 6, 2001, the Commission denied a rehearing in this case. See page 110 of this volume for that order. On March 31, 2001, this case was appealed to Cole County Circuit Court (01CV323740). On January 3, 2002, this case was appealed to the Missouri Court of Appeals, Western District (WD60928).

Telecommunications §14. The Commission is mindful that the telephone companies, and their owners, have a constitutional right to a fair and reasonable return upon their investment.

Telecommunications §36. Although the federal Telecommunications Act of 1996 provides that reciprocal compensation arrangements for local traffic are a mandatory feature of agreements between carriers, including wireless carriers, and LECs, that provision does not apply where, as here, there are no such agreements between the parties. The Act does not state that reciprocal compensation is a necessary component of the tariffs of LECs or ILECs.

Telecommunications §36. The pricing standards contained in the federal Telecommunications Act of 1996, and the FCC's implementing regulations, apply to the arbitration of interconnection agreements by the Commission. These standards do not apply where there are no such agreements under arbitration.

Rates §8. Telecommunications §14. The Wireless Termination Tariffs proposed by several small ILECs, all of which were subject to traditional rate-of-return regulation, nonetheless did not violate the rule against single-factor ratemaking because they introduced a new service.

Rates §8. Telecommunications §7. The rule against single-factor ratemaking applies to the Commission's review of the exchange access rates of telephone cooperatives in the same way that it applies to telephone corporations subject to rate-of-return ratemaking.

Rates §110. Company's proposed Wireless Termination Tariff introduced a new service because it applied to different traffic than the Company's existing Radio Common Carrier Interconnection Service Tariff.

Telecommunications §2. Traffic-blocking provision in proposed Wireless Termination Tariffs was permissible in that it amounted to no more than a request that Southwestern Bell enforce the provisions of its own tariff.

APPEARANCES

W.R. England, III, and Brian T. McCartney, Attorneys at Law, Brydon, Swearingen & England, P.C., Post Office Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102-0456, for the Mark Twain Group, including BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Green Hills Telephone Corp., Holway Telephone Company, IAMO Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Peace Valley Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, and Steelville Telephone Exchange, Inc.

Craig Johnson, Attorney at Law, Andereck, Evans, Milne, Peace & Baumhoer, 700 East Capitol Avenue, Jefferson City, Missouri 65101, for the Alma Group, including Alma Telephone Company, Choctaw Telephone Company, and MoKan Dial, Incorporated.

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Jeanne A. Fischer, Attorney at Law, Southwestern Bell Wireless, 13075 Manchester Road, Suite 100, St. Louis, Missouri 63131, for Southwestern Bell Wireless, Inc.

Martin C. Rothfelder, Attorney at Law, Rothfelder Law Offices, 625 Central Avenue, Westfield, New Jersey 07090, for Nextel West, Inc.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Bruce H. Bates, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Procedural History

On September 8, 2000, AT&T Wireless Services, Inc. (AT&T), filed motions to reject tariff or, alternatively, to suspend tariff and grant intervention, with respect to a series of identical "Wireless Termination Service" tariffs submitted by certain rural incumbent local exchange carriers (collectively, the Rural ILECs, the small LECs or the Filing Companies),¹ to-wit: Mark Twain Rural Telephone Company (Mark Twain; Case No. TT-2001-139, Tariff No. 200100176),² Seneca Telephone Company (Seneca; Case No. TT-2001-140, Tariff No. 200100172), New Florence Telephone Company (New Florence; Case No. TT-2001-141, Tariff No. 200100175), Granby Telephone Company (Granby; Case No. TT-2001-142,

¹ As noted under Appearances, the Filing Companies fall into two groups, each represented by separate counsel. Where it is necessary to distinguish these, they are referred to as the Mark Twain Group and the Alma Group. respectively.

² Except as specifically noted herein, each of these tariffs was filed on August 18, 2000, for service rendered on and after September 22, 2000.

Tariff No. 200100165), Citizens Telephone Company of Higginsville, Missouri, Inc. (Citizens; Case No. TT-2001-143, Tariff No. 200100189), Fidelity Telephone Company (Fidelity; Case No. TT-2001-144, Tariff No. 200100163), BPS Telephone Company (BPS; Case No. TT-2001-145, Tariff No. 200100180),³ Ellington Telephone Company (Ellington; Case No. TT-2001-146, Tariff No. 200100180), Kingdom Telephone Company (Kingdom; Case No. TT-2001-147, Tariff No. 200100168), Oregon Farmers Mutual Telephone Company (Oregon Farmers; Case No. TT-2001-148, Tariff No. 200100161), Alma Telephone Company (Alma; Case No. TT-2001-149, Tariff No. 200100150),⁴ Cass County Telephone Company (Cass; Case No. TT-2001-150, Tariff No. 200100188), MoKan Dial, Inc. (MoKan; Case No. TT-2001-151, Tariff No. 200100149), Peace Valley Telephone Company (Peace Valley; Case No. TT-2001-152, Tariff No. 200100167), Farber Telephone Company (Farber; Case No. TT-2001-153, Tariff No. 200100162), Rock Port Telephone Company (Rock Port; Case No. TT-2001-154, Tariff No. 200100166), Le-Ru Telephone Company (Le-Ru; Case No. TT-2001-155, Tariff No. 200100177), Goodman Telephone Company (Goodman; Case No. TT-2001-156, Tariff No. 200100173), Steelville Telephone Exchange, Inc. (Steelville; Case No. TT-2001-157, Tariff No. 200100178), Miller Telephone Company (Miller; Case No. TT-2001-158, Tariff No. 200100171), Lathrop Telephone Company (Lathrop; Case No. TT-2001-159, Tariff No. 200100169), Ozark Telephone Company (Ozark; Case No. TT-2001-160, Tariff No. 200100174), Green Hills Telephone Company (Green Hills; Case No. TT-2001-161, Tariff No. 200100158), KLM Telephone Company (KLM; Case No. TT-2001-162, Tariff No. 200100156), Holway Telephone Company (Holway; Case No. TT-2001-163, Tariff No. 200100157), McDonald County Telephone Company (McDonald; Case No. TT-2001-164, Tariff No. 200100170), Craw-Kan Telephone Cooperative, Inc. (Craw-Kan; Case No. TT-2001-165, Tariff No. 200100179), IAMO Telephone Company (IAMO; Case No. TT-2001-166, Tariff No. 200100159), and Choctaw Telephone Company (Choctaw; Case No. TT-2001-167, Tariff No. 200100151).⁵

On September 11, 2000, Southwestern Bell Wireless, Inc. (SWBW), filed its identical motions to reject tariff or, alternatively, to suspend tariff and grant intervention, with respect to the Wireless Termination Service tariffs submitted by the Rural ILECs. Also on September 11, Nextel West, Inc. (Nextel) filed motions to reject tariff or, alternatively, to suspend tariff and grant intervention, with respect to the Wireless Termination Service tariffs submitted by the Rural ILECs. The Staff of the Missouri Public Service Commission (Staff) responded in support of each of AT&T's motions on September 11; Alma, MoKan and Choctaw responded in opposition on the same date. On September 13, Sprint Spectrum L.P., doing business as Sprint PCS (Sprint), filed its motions to reject tariff or, alternatively, to suspend tariff and grant intervention, with respect to each of the Wireless Termination

³ Filed on August 17, 2000, for service rendered on and after September 22, 2000.

⁴ Filed on August 18, 2000, for service rendered on and after September 20, 2000.

⁵ Filed on August 18, 2000, for service rendered on and after September 20, 2000.

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nation Service tariffs submitted by the Rural ILECs. Cellco Partnership and Cybertel Cellular Telephone Company, doing business as Verizon Wireless (Verizon), filed a similar motion on September 14, 2000.

On September 14, the Commission issued its Order Setting Time for Response, permitting the Rural ILECs to file responses to the motions to reject or suspend by Noon on Monday, September 18, 2000. On September 15, 2000, several of the ILECs filed responses. Thereafter, on September 19, 2000, the Commission issued its Order Suspending Tariff, Consolidating Cases, Directing Notice, Granting Intervention, and Setting Prehearing Conference. The Commission suspended each of the proposed tariffs for 120 days, until January 20, 2001, excepting the tariffs filed by Alma and Choctaw, which, having been filed earlier than the others, were suspended until January 18, 2001. The Commission also consolidated all of the cases into Case No. TT-2001-139, directed notice to every Missouri-certificated telecommunications carrier, and set an intervention deadline of October 10. The Commission also granted intervention to AT&T Wireless, Sprint PCS, Nextel, SWBW, and Verizon, and set a prehearing conference for October 24, 2000.

On October 3, 2000, Southwestern Bell Telephone Company (SWBT) applied to intervene. On October 5, 2000, ALLTEL Communications, Inc. (ALLTEL), applied to intervene. On October 23, the Rural ILECs filed the Direct Testimony of Robert C. Schoonmaker, with an inadvertently omitted schedule filed on October 25.

On October 24, 2000, a prehearing conference was held in this matter. On November 14, 2000, the Commission issued its Order Adopting Procedural Schedule. Therein, the Commission granted intervention to SWBT and ALLTEL. The Commission adopted a procedural schedule which met the needs of all parties, insofar as possible given the short interval available. The Commission also established a briefing schedule in its order of November 14.

On November 20, 2000, AT&T, SWBW, Verizon, Sprint PCS, and Nextel (the Wireless Intervenors) filed a Motion to Dismiss.⁶ Alma, MoKan, and Choctaw (the Alma Group) responded in opposition on November 27. The parties filed Rebuttal Testimony on November 28, 2000, excepting SWBW, which filed one day late on November 29. The Mark Twain Group⁷ responded in opposition to the Motion to Dismiss on November 30. Also on November 30, both SWBT and the Mark Twain Group moved for the establishment of a protective order to protect proprietary and highly confidential information. The Staff filed the List of Issues on December 1, and the parties filed their Position Statements on December 6. The Commission granted the requested protective order on December 7, 2000. Surrebuttal Testi-

⁶ Verizon withdrew as a proponent of the Motion to Dismiss on November 27, 2000. As used generally in this Report and Order to designate the opponents of the Filing Companies, excepting SWBT, the phrase Wireless Intervenors includes ALLTEL, AT&T, Nextel, Sprint PCS, SWBW, and Verizon.

⁷ See Footnote 1. The "Mark Twain Group" consists of all of the Rural ILECs except Alma, MoKan and Choctaw.

mony was filed on December 8. The Commission took the Motion to Dismiss with the case.

An evidentiary hearing was held on December 11 and 12, 2000, at the Commission's offices in Jefferson City, Missouri. All of the parties appeared by counsel, except Verizon, which had earlier advised the presiding officer that it would not appear. Initial Briefs were timely filed on December 29, 2000; Reply Briefs were timely filed on January 5, 2001.

On January 11, 2001, the Commission suspended the tariffs at issue for a further period of 30 days, up to the limit of 150 days permitted by Section 392.230.5.

The Wireless Intervenors' Motion to Dismiss:

On the eve of the hearing in this matter, the Wireless Intervenors⁸ filed a Motion to Dismiss. The Commission announced at the opening of the hearing that it would take that motion with the case. Inasmuch as the grounds urged in the motion to dismiss are the same grounds argued in the briefs of the Wireless Intervenors, the issues therein raised shall be discussed in the Conclusions of Law section of this Report and Order.

The Commission does note that "dismissal" is not an appropriate remedy with respect to a proposed tariff. When a tariff is presented to the Commission for approval, the Commission may approve the tariff, reject the tariff, or suspend the tariff for all or part of a period set by statute in order to further investigate and consider the proposed tariff. At the end of the suspension period, the Commission must either approve or reject the tariff.

The Commission will construe the Wireless Intervenors' Motion to Dismiss as a motion to reject the proposed tariffs.

Discussion

The Issues:

Pursuant to Commission procedure in contested cases, and as directed by the procedural schedule, the parties jointly submitted the following list of issues for resolution by the Commission:

1. Is it lawful and/or reasonable to implement a tariff for the provision of wireless termination service?

(a) Do the Filing Companies have an obligation to negotiate reciprocal compensation arrangements? If so, have Filing Companies met that obligation?

(b) Do the proposed tariffs meet applicable requirements, if any, of federal and state law for compensation arrangements between Filing Companies and wireless carriers for termination of intraMTA traffic?

(c) Is the proposed tariff rate lawful and reasonable?

(d) What obligations do the Filing Companies have to compensate wireless carriers for the termination of traffic originating in the Filing Companies' exchanges and terminating to wireless customers? If there are such obligations,

⁸ The "Wireless Intervenors" are AT&T, SWBW, Verizon, Sprint PCS, and Nextel.

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is it appropriate to include that compensation in the Filing Companies' wireless termination service tariff?

2. Should the Commission establish a default rate to be imposed absent a tariff or negotiated agreement?

3. Is it lawful and appropriate for the proposed tariffs to provide for the blocking of calls by the Filing Companies or by an intermediate transport provider?

(a) If so, does the Commission's order approving that tariff provision require intermediate transport providers to block an originating wireless carrier's traffic at the direction of the Filing Companies?

(b) What information must the Filing Companies provide the intermediate transport provider before the intermediate transport provider is required to implement such blocking?

(c) Who should bear the cost incurred by the intermediate transport provider to implement such blocking and how should those costs be recovered?

(d) Should the Filing Company requesting blocking indemnify the intermediate transport provider against claims made and damages suffered by other parties arising from the blocking?

4. Is the requirement in the proposed tariffs that the wireless carriers provide billing information lawful and appropriate? If so, would it also be appropriate to compensate the wireless carriers for providing billing information?

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

The Nature of the Dispute:

This matter concerns calls made from cellular or wireless telephones to subscribers of certain small Missouri incumbent local exchange carriers (ILECs). This wireless-originated traffic is handed off by the wireless carrier (also referred to as a Commercial Mobile Radio Services or CMRS carrier) to the interconnected large local exchange carrier (LEC) for transport to the destination telephone within the network of the small ILEC. Although the wireless subscriber pays the wireless carrier for making such calls, and the wireless carrier compensates the large LEC for transporting the traffic, no one has been compensating the small ILECs for the use of their networks in completing each such call. The proposed Wireless Termination Service tariffs that are the subject of this case make clear that the small ILECs must be compensated by the wireless carrier for this traffic or the traffic may be blocked. The proposed tariffs include rates by which compensation shall be calculated.

The small ILECs also want compensation for past wireless-originated traffic terminated to their subscribers. However, the CMRS carriers contend that the small

ILECs have already been adequately and acceptably compensated for this past traffic by a *de facto* bill-and-keep arrangement.⁹ See e.g. Brown Rebuttal at 3. This issue is not before the Commission in this case.

The Parties:

The small ILECs that have filed proposed Wireless Termination Service Tariffs are listed *supra*, on pages 4-5. Each of the Filing Companies is a telecommunications company and a small telephone company within the intendments of Sections 386.020(51) and 392.230.4, RSMo 2000;¹⁰ each is certificated to, and does, provide basic local exchange telephone service to subscribers within one or more exchanges in the state of Missouri. Certain of the Filing Companies are telephone cooperatives as defined in Section 386.020(54): Craw-Kan, Green Hills, IAMO, Kingdom, Mark Twain, and Rock Port. Each of the Filing Companies is a LEC, an ILEC and a telecommunications carrier for the purposes of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code (the Act), and its implementing regulations.

The Wireless Intervenors are AT&T Wireless, SWBW, Nextel, Sprint PCS, Verizon Wireless, and ALLTEL. Each of the Wireless Intervenors provides cellular or wireless telephone services to subscribers pursuant to certification, and within a service area authorized, by the Federal Communications Commission (F.C.C.), an agency of the government of the United States. Each of the Wireless Intervenors is a telecommunications carrier for the purposes of the Act and its implementing regulations; however, the Wireless Intervenors are neither LECs nor ILECs for the purposes of the Act.

SWBT, like the Filing Companies, is a telephone corporation, a large incumbent local exchange company, a telecommunications carrier, and a Bell operating company for the purposes of the Act, its implementing regulations and Chapters 386 and 392, RSMo.

The Staff of the Commission is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]" Section 386.071.

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]" Sections 386.700 and 386.710.

⁹"Bill-and-keep" means that neither party compensates the other directly, but each bills its own originating customers and keeps the portion of the resulting revenue that otherwise would have been paid as compensation for termination. Brown Rebuttal at 11. The F.C.C. has determined that such an arrangement is permissible *only* where (1) neither carrier has "rebutted the presumption of symmetrical rates" and (2) the volume of traffic flowing in each direction is approximately equal. *Wireless Interconnection Order, Para. 1111*.

¹⁰ Unless otherwise specified, all statutory references herein are to the Revised Statutes of Missouri (RSMo), revision of 2000.

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Historical Background of the Dispute:

The background of this case involves the interrelationship of local telephone companies and long distance telephone companies.

Access rates are the rates that a LEC charges a long distance telephone company, referred to as an interexchange carrier (IXC), for “access” to its subscribers in completing a long distance call. Each long distance or “toll” call involves two access charges, an originating access charge for access to the subscriber who dials the call and a terminating access charge for access to the subscriber who receives the call. The access charges are not billed directly to subscribers, but are paid by the IXC to the LECs that serve the subscribers involved in the call. The purpose of access charges is to compensate the LECs for the use of the local network. The LEC, which builds, operates and maintains the local network, has invested significant capital in creating the local network and incurs significant costs in operating and maintaining it. AT&T witness Kohly stated that access rates are not cost-based and historically have been priced above costs in order to subsidize the cost of providing local telephone service.

From the point of view of the small LECs, a wireless-originated call is a toll call. It originates outside of their local networks and is transported to their local networks by an intervening carrier. If the intervening carrier is an IXC, the small LECs are paid for terminating access. However, if the intervening carrier is a large LEC, then the small LECs do not receive compensation.

During the 1980s and early 1990s, SWBT had a wireless termination tariff under which SWBT undertook to terminate traffic originating from wireless carriers anywhere within the LATA.¹¹ However, SWBT did not provide any compensation to other LECs for the use of their networks in terminating this traffic. When SWBT eventually did offer compensation, it was in the form of a share of the revenues SWBT was collecting under the tariff; most of the LECs refused to agree to accept compensation under this proposal. For this reason, the wireless carriers interconnected with SWBT and did not bother to interconnect with the small LECs. In fact, given the number of small LECs, indirect interconnection between CMRS carriers and small LECs, through a large LEC’s tandem switch, is the only economically feasible means of interconnection available.

In April 1997, the Commission upheld a complaint brought by United Telephone Company (United) against SWBT for failure to pay terminating access charges for the termination of wireless traffic to United subscribers. The Commission directed SWBT to compensate United for wireless-originated traffic terminated by SWBT to United subscribers on the basis of United’s access rates. *In the Matter of United Telephone Company*, Case No. TC-96-112 (*Report & Order*, iss’d April 11, 1997). The Commission reaffirmed this position in two further decisions issued in 1999. *In the Matter of Chariton Valley Telephone Corporation*, Case No. TC-98-251 (*Report & Order*, iss’d June 10, 1999) (Crompton, C., concurring & Murray, C., dissenting) and *In the Matter of Mid-Missouri Telephone Company*,

¹¹ A LATA is a Local Access and Transport Area. 47 U.S.C. Section 153(25).

Case No. TC-98-340 (*Report & Order*, iss'd June 10, 1999) (Crompton, C., concurring & Murray, C., dissenting).

After the *United* decision, SWBT sought to revise its wireless termination tariff to eliminate its liability for terminating access charges. The small LECs opposed SWBT's proposed revised tariff and, after a hearing, the Commission rejected it. *In the Matter of Southwestern Bell Telephone Company*, Case No. TT-97-524 (*Report & Order*, iss'd December 23, 1997). However, the Commission did permit SWBT to make certain changes to its wireless termination tariff, including discontinuance of the "end-to-end" termination feature. SWBT's revised wireless termination tariff became effective on February 6, 1998. SWBT charges \$0.0077 per minute to transport traffic under this tariff. SWBT also charges under this tariff for the termination of wireless-originated traffic to its subscribers; these charges are higher than SWBT's access rates.

Under its revised tariff, SWBT no longer undertakes to terminate the wireless-originated traffic. SWBT's revised wireless termination tariff explicitly states that "[w]ireless carriers shall not send calls to SWBT that terminate in an Other Telecommunications Carrier's network unless the wireless carrier has entered into an agreement to directly compensate that carrier for the termination of such traffic." Exhibit 14, SWBT's Wireless Carrier Interconnection Service tariff, P.S.C. Mo. No. 40, Section 6.9 (5th Revised Sheet 16.02); and see *In the Matter of Southwestern Bell Telephone Company*, Case No. TT-97-524 (*Report & Order*, iss'd December 23, 1997). However, SWBT has continued to carry traffic from CMRS carriers to small LECs for termination, regardless of whether or not agreements exist between them.

Because the wireless-originated traffic continues to be terminated to subscribers of the small LECs at no extra cost to the CMRS carriers, there is no incentive for those carriers to enter into agreements with the small LECs. Since the implementation of SWBT's revised tariff in February 1998, not a single such termination compensation agreement has been made between a CMRS carrier and a small LEC. In those instances in which a small LEC has presented a bill to a CMRS carrier, the bill has generally not been paid. The CMRS carriers do not deny that the small LECs have never been directly paid, although they do maintain that a "*de facto* bill-and-keep" arrangement has compensated the small LECs.

Following SWBT's revision of its tariff, certain small Missouri LECs sought to amend their switched access tariffs to apply "to all traffic regardless of type or origin, transmitted to or from" their facilities "by any other carrier, directly or indirectly, until and unless superceded by an agreement approved pursuant to the provisions of 47 U.S.C. 252[.]" However, the Commission rejected the proposed revised access tariffs, concluding that intraMTA¹² traffic to and from a wireless carrier is local traffic and that local traffic is not properly subject to switched access charges. *In the Matter of Alma Telephone Company*, Case No. TT-99-428 (*Report & Order*, iss'd January 27, 2000).

¹² An MTA is a Major Trading Area, an arbitrarily defined geographic region which constitutes the largest service area authorized by the F.C.C. for a CMRS carrier.

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At present, with the termination of the PTC Plan,¹³ it is the norm that traffic between the small LECs and CMRS carriers is one-way traffic. This is because traffic to CMRS subscribers from the small LECs' subscribers is transported by IXC's and treated as toll traffic. The Filing Companies' expert witness, Robert Schoonmaker, explained that the CMRS carriers' switches are located outside of the local calling scopes of the small LECs and that such calls are necessarily toll calls, and thus carried by an IXC. The CMRS carriers' witnesses admitted that the traffic is being carried by IXC's, but contend that this is a business choice made by the small LECs in order to generate access charges. In either case, if the traffic is carried by an IXC, the IXC must compensate the CMRS carrier for the termination of the call. According to Schoonmaker, this creates another disincentive for the CMRS carriers to enter into agreements with the small LECs, in that the CMRS carriers cannot expect to receive much reciprocal compensation.

As noted, SWBT continues to terminate wireless-originated traffic to the Filing Companies' subscribers without providing any compensation to the Filing Companies with respect to this traffic. The Filing Companies LECs are unable to block or even measure this traffic. However, SWBT can measure this traffic and does do so, rendering monthly cellular terminating usage summary reports (CTUSRs) to the Rural ILECs. The CTUSR shows the minutes of terminating use to each Rural ILEC from each CMRS provider. However, the value of the CTUSR for billing is reduced because it does not distinguish between intrastate traffic and interstate traffic.

Each side in this matter contends that the other side has not been willing to enter into good-faith negotiations leading to interconnection agreements. Having considered the evidence and testimony offered on this point, the Commission concludes that neither side has been willing to make the compromises necessary for reaching an agreement. The wireless-originated traffic is presently being terminated despite the general absence of interconnection and traffic termination agreements. The small LECs are unable to terminate service unilaterally or even to measure the traffic. It is noteworthy that both sides agree that the Filing Companies are entitled to receive compensation for the termination of wireless-originated traffic. See *e.g.*, Scheperle Rebuttal at 3.

The Proposed Wireless Termination Service Tariffs:

The Filing Companies filed nearly identical proposed Wireless Termination Tariffs in August, 2000; the tariffs differ only in the rate set for each company. Each tariff filing was accompanied by a transmittal letter describing the proposed tariff as a "new local service." The proposed Wireless Termination Service tariffs apply only to intraMTA, wireless-to-wireline traffic where the originating CMRS carrier and the terminating LEC are indirectly interconnected and the traffic is transported by an intervening LEC. The tariffs are expressly subordinated to Commission-approved interconnection and traffic termination agreements. The tariffs also do not apply to traffic which the CMRS carrier has arranged for another carrier, such as an IXC, to terminate.

¹³PTC is Primary Toll Carrier.

In addition to general provisions, each of the proposed tariffs contains definitions, provisions limiting the liability of the filing company, provisions concerning records, billing and verification reviews, provisions concerning refusal and discontinuance of service, and rates and charges.

With respect to records and billing, each of the proposed tariffs states that the CMRS carriers will provide, if possible, traffic records to the LEC at individual call detail. If such records cannot be provided, the CMRS carriers must provide a report, at least quarterly, showing the percentage of the traffic that is interMTA and intraMTA, and interstate and intrastate. The tariffs require that these reports be based on actual traffic studies. The tariffs further require that the CMRS carriers shall conduct such studies at least quarterly and that the studies shall be made available to the Filing Companies upon demand. The tariffs also provide for verification reviews, or audits, to ensure the accuracy of the CMRS carriers' reports. The tariffs require the CMRS carriers to provide on-site access to necessary information upon "reasonable written notice."

In the event that a CMRS carrier fails to comply with the terms and conditions set out in the tariffs, including failure to pay undisputed charges within 30 days, the LECs may, upon 30 days written notice, terminate service to the CMRS carrier. The tariffs provide that the LECs may request the assistance of interconnected LECs to effectuate discontinuance of service if the small LEC is unable to do so at its own office. The Rural ILECs lack the capacity to block the CMRS traffic themselves.

The record of this matter includes, as Exhibit 14, SWBT's Wireless Carrier Interconnection Service tariff, P.S.C. Mo. No. 40, effective July 15, 1994. SWBT's tariff provides, at 4th Revised Sheet 6, for the termination of service upon 30 days notice by certified mail for nonpayment or other violations of the tariff. SWBT's tariff also provides, at 5th Revised Sheet 16.02, that "[w]ireless carriers shall not send calls to SWBT that terminate in an Other Telecommunications Carriers' [sic] network unless the wireless carrier has entered into an agreement to directly compensate that carrier for the termination of such traffic." So far as the present record reveals, SWBT has done nothing to enforce this provision of its tariff. Finally, SWBT's tariff also requires CMRS carriers which pass traffic to SWBT for transport to indemnify SWBT for any charges which SWBT may be liable for with respect to the termination of the traffic.

Rock Port's Radio Common Carrier Interconnection Service Tariff:

In the Proposed Findings of Fact and Conclusions of Law filed by counsel for the Mark Twain Group, it is stated that Rock Port has had a Radio Common Carrier Interconnection Service tariff since January 31, 1992. *See In the Matter of the Tariff Filing of Rock Port Telephone Company*, Case No. TR-92-152 (*Order Approving Tariff*, issued January 31, 1992). The Commission takes notice of that tariff, as filed with the Commission; it currently provides rates for termination as follows:¹⁴

¹⁴These rates were filed on December 11, 2000, and became effective on January 1, 2001. They are identical to the rates in effect between February 2, 1992, and January 1, 2001, when Rock Port replaced its entire P.S.C. Mo. Tariff No. 1 with its P.S.C. Mo. Tariff No. 2.

Type 1: Mileage from the Point of Inter- connection to the Central Office:	Per Minute of Use:	
	Within the Local Calling Scope:	Outside the Local Calling Scope:
0-1 mile	\$.02	(1)
Over 1-25 miles	.025	(1)
Over 25-50 miles	.03	(1)
Over 50 miles	.04	(1)
Type 2B:	\$.01	(1)

(1) Based on rate equivalence with Access Service rate elements as specified in paragraph 15.6.2, C preceding.

By its express terms, Rock Port’s Radio Common Carrier Interconnection Service tariff applies only to cases of direct interconnection.

The Proposed Rates:

The proposed tariffs herein at issue set per-minute rates ranging from \$0.0506 to \$0.0744 per minute of use, with an average of \$0.0605. The proposed termination rates are a single per-minute charge, consisting of a composite of the current intrastate, intraLATA access rates of each of the Filing Companies for switching and transport, plus a two-cent per minute “add-on” to contribute to the cost of the local loop facilities. The Filing Companies’ intrastate, intraLATA access rates are based upon their revenue requirement as established at the time the intraLATA toll pool was replaced by the PTC Plan, as adjusted by any subsequent earnings investigations.

The rates were developed using a forward-looking cost study generated by the HAI Model, Version 5.0a, which has been sponsored by AT&T in numerous proceedings in this state and elsewhere. The model has been extensively documented. The model provides outputs in the form of the cost of access. The model has over 1,000 user-definable inputs, some of which were modified by the Filing Companies’ expert consultant, Schoonmaker, from the default values in order to better “fit” the model to the Missouri small, rural ILECs. In particular, the model was modified to reflect the significantly larger percentage of buried plant in rural Missouri; to reduce the overall rate of return to 11.25 percent; to reduce the level of total interoffice minutes to a level more representative of the small LECs; to increase central office switching equipment investment; to increase customer operations expense; to eliminate the network operations expense projected reduction; to reflect the small LECs’ actual ratio of central office switching expense to investment; to reflect Staff’s guideline depreciation rates for Missouri small companies; and to more realistically reflect the sharing of outside plant structures with other utilities.

The HAI Model was run for each of the Rural ILECs and the result compared to each company's filed access rates. See Schedule RCS-2. The HAI Model resulted in per-minute rates ranging from \$0.0454 to \$0.4369, with an average of \$0.1149. Because the HAI-developed rates were higher, in most cases, than the current filed, traffic-sensitive switched access rates, the latter were used to develop the proposed wireless termination tariff rates. The forward-looking rates produced by the HAI Model, including the adder, average \$0.1149. The rates actually proposed by the Rural ILECs, including the adder, average \$0.0605.

The Filing Companies' expert witness, Schoonmaker, testified that the two-cent adder is an arbitrary figure. Its purpose is to impose a contribution toward the cost of the local loop, albeit small, upon the CMRS carrier. This is appropriate, testified Schoonmaker, because the CMRS carrier must have access to and use the local loop to terminate its traffic.

The expert witnesses sponsored by the CMRS carriers uniformly take the position that the HAI-generated rates are too high and that the rates contained in the proposed tariffs are too high. SWBW's expert witness testified, for example, that most of the CMRS-to-small-LEC termination rates in this country are close to \$0.0100 per minute, while the proposed tariffs herein at issue set per-minute rates ranging from \$0.0506 to \$0.0744 per minute of use, with an average of \$0.0605. The Filing Companies' expert witness testified that, in his opinion, the experts sponsored by the CMRS carriers were generally unfamiliar with the cost characteristics of small ILECs.

Switching costs, based on software costs and central processor costs, are significantly less for large ILECs such as SWBT, Sprint and GTE (now Verizon), than for small ILECs such as the Filing Companies. The cost of switching per call rises as the size of the switch gets smaller. The same applies to the cost of transport capacity. Small exchanges with low traffic volumes have very high per-call transport costs. Large ILECs are able to spread their costs over much greater traffic volumes, resulting in substantially lower costs per call.

Alternative Rate Proposals:

The CMRS carriers have proposed alternative rates. Sprint PCS offers three alternatives: First, Sprint PCS suggests that "the Commission review the reciprocal compensation rates approved by the Commission for other small companies in Missouri." Second, Sprint PCS suggests that the Commission "review rates included in reciprocal compensation agreements in other states." Third, Sprint PCS suggests that the Commission "look towards other rates the small companies use for the termination of traffic as a proxy."

Building on its third suggestion, "Sprint PCS suggests that the filing parties' interstate access rates, with some adjustments, may be more representative of cost based rates than those rates included in the Wireless Termination Service tariffs." These interstate access rates range from \$0.022474 to \$0.038567 for the filing companies. Sprint PCS proposes to adjust these rates by eliminating the non-traffic sensitive portion, that is, the loop, which may be as much as 60 percent of the total. The resulting suggested rates devised by Sprint PCS range from \$0.016892 to \$0.028842.

AT&T Wireless also offered three alternative suggestions. First, AT&T suggests that the Commission look to the “cost-based rates for the transportation and termination of local traffic” established by the Commission in the “AT&T/MCI SWBT Arbitration proceeding.” These rates, for SWBT’s smallest exchanges, are as follows:¹⁵

<u>Rate Element</u>	<u>Rate</u>
Local Switching (per minute)	\$0.03444
Transport (per minute, per mile)	\$0.00015
Transport Termination (per minute)	\$0.00302
Total (assuming 10 miles of transport)	\$0.03896

AT&T further argues that the Commission should apply the F.C.C. large-LEC-to-small-LEC rule, which requires that the reciprocal compensation rates be based on the large LEC’s costs rather than the small LEC’s costs.

Second, AT&T suggests the Commission look to the default proxies “as a useful benchmark.” The default proxy for end office switching is \$0.002 to \$0.004 per minute and for tandem switching is \$0.0015 per minute. Third, AT&T asserts that, in the many interconnection agreements it has entered into throughout the nation, the termination rates for smaller carriers range from \$0.01 to \$0.02 per minute.

Staff also proposes an alternative rate. Staff suggests that the Commission impose a “generic default rate” on the Rural ILECs for cases in which an approved interconnection agreement or tariff does not exist. The generic default rate could be developed either by extrapolation from rates contained in approved interconnection agreements or based on rates tariffed by SWBT for instances in which an interconnection agreement does not exist. However, Staff admits that its proposals are not based on a forward-looking economic cost study.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of each of the telephone corporations involved herein pursuant to Section 386.250 and Chapter 392, RSMo.

Telephone Cooperatives

The Commission has no jurisdiction over the rates of telephone cooperatives, except with respect to exchange access. Sections 386.250(2) and 392.220, subsections 2 and 5. However, because the proposed tariff and rates herein at

¹⁵Kohly Rebuttal at 29.

issue are in the nature of exchange access, the Commission concludes that it does have jurisdiction over the proposed tariffs and rates filed by the telephone cooperatives that are parties to this proceeding.

Like exchange access, the wireless termination service applies to traffic originating outside of an exchange or local calling scope. Moreover, the Commission has previously concluded that terminating exchange access charges applied to the termination of wireless-originated traffic in the absence of a specific tariffed rate. *In the Matter of United Telephone Company*, Case No. TC-96-112 (*Report & Order*, iss'd April 11, 1997); *In the Matter of Chariton Valley Telephone Corporation*, Case No. TC-98-251 (*Report & Order*, iss'd June 10, 1999) (Crompton, C., concurring & Murray, C., dissenting) and *In the Matter of Mid-Missouri Telephone Company*, Case No. TC-98-340 (*Report & Order*, iss'd June 10, 1999) (Crompton, C., concurring & Murray, C., dissenting). Like exchange access charges, the charges for wireless termination will be paid by other telecommunications carriers rather than by the members of the telephone cooperative. Consequently, the Commission concludes that the legislature intended that wireless termination charges, like exchange access charges, be subject to Commission review to ensure that they are just and reasonable.

What Legal Standards Apply?

The initial step of the analysis is to determine which legal standards govern the resolution of this matter. As a starting point, the Commission is mindful that the Filing Companies, and their owners, have a constitutional right to a fair and reasonable return upon their investment. *State ex. rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App., W.D. 1981).

The parties, in their list of issues, have asked the Commission to determine whether or not the proposed Wireless Termination Service tariffs are lawful under various provisions of federal and state law.

Federal Law—The Telecommunications Act of 1996:

The Wireless Intervenors assert that the proposed Wireless Termination tariffs are unlawful and must be rejected because they do not comply with the Telecommunication Act of 1996 (the Act) and its implementing regulations. In particular, they complain that the rates contained in the proposed tariffs do not comply with the pricing requirements of the statute, or of the implementing regulations of the F.C.C. Likewise, the Wireless Intervenors complain that the proposed tariffs do not comply with the statute's obligation of reciprocal compensation.

Reciprocal Compensation

The Act imposes certain obligations on LECs, including "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. Section 251(b)(5). It also imposes on ILECs the "duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this subsection." 47 U.S.C. Section 251(c)(1). The

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duty to negotiate in good faith specifically extends to the duty to establish reciprocal compensation arrangements. Thus, it is apparent from the Act that reciprocal compensation arrangements are a mandatory feature of agreements between the CMRS carriers and the small LECs. However, the record shows that at present there are no such agreements between the parties to this case.¹⁶ The Act does not state that reciprocal compensation is a necessary component of the tariffs of LECs or ILECs. Therefore, the Commission concludes that Section 251(b)(5) of the Act simply does not apply to the proposed tariffs herein at issue. For the same reason, the Commission concludes that the proposed tariffs are not unlawful under Section 251(b)(5) of the Act.

The Act obligates the Filing Companies to negotiate interconnection agreements, which must include reciprocal compensation arrangements for local traffic; where agreement cannot be reached through negotiation, the Filing Companies are subject to mandatory arbitration under the Act. Presumably, if there are aspects of these tariffs which the CMRS carriers do not like, they will take advantage of these provisions of the Act.¹⁷

Pricing Standards

The Wireless Intervenor also contend that the proposed tariffs are unlawful under the pricing standards contained in the Act and interpreted and implemented by the F.C.C.'s regulations.

The Act provides, at Section 252(d), as follows:

(d) Pricing standards.—

* * *

(2) Charges for transport and termination of traffic.—

(A) In general.—For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the

¹⁶ With the exception of three small LECs operated by TDS Telecom, which have negotiated interconnection agreements with CMRS carriers, including wireless-to-wireline termination rates, approved by the Commission in Case No. TO-2000-407:

<u>Company</u>	<u>Per Minute Terminating Rate</u>
Orchard Farm	\$0.019655
New London	\$0.019540
Stoutland	\$0.014760

¹⁷ The Commission need not, to resolve this case, determine whether or not the Filing Companies have met their obligation to negotiate interconnection agreements.

mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction.—This paragraph shall not be construed-

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

* * *

Pursuant to its statutorily delegated authority, the F.C.C. has promulgated regulations implementing and interpreting the pricing standards contained in the Act. The rules may be found at 47 C.F.R. Part 51, Sections 701 through 717.¹⁸ Rule 51.701(a) provides that "[t]he provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers." Section 51.705 provides:

(a) An incumbent LEC's rates for transport and termination of local telecommunications traffic shall be established, at the election of the state commission, on the basis of:

(1) The forward-looking economic costs of such offerings, using a cost study pursuant to Secs. 51.505 and 51.511;

¹⁸ Part 51 of the federal rules is entitled "Interconnection"; Subpart H, which includes Sections 51.701 through 51.717, applies to "Reciprocal Compensation Arrangements for Transport and Termination of Local Telecommunications Traffic."

(2) Default proxies, as provided in Sec. 51.707; or

(3) A bill-and-keep arrangement, as provided in Sec. 51.713.

(b) In cases where both carriers in a reciprocal compensation arrangement are incumbent LECs, state commissions shall establish the rates of the smaller carrier on the basis of the larger carrier's forward-looking costs, pursuant to Sec. 51.711.

The pricing standards contained in the Act, which the F.C.C.'s pricing regulations interpret and implement, provide guidance to state commissions in the arbitration of interconnection agreements. Subsection 252(c) of the Act, labeled "Standards for Arbitration," provides that "[i]n resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a state commission shall . . . (2) establish any rates for interconnection, services, or network elements according to subsection (d)[.]" The pricing standards are, by their very terms, "[f]or the purposes of compliance . . . with section 251(b)(5)[.]" The Commission has already reviewed Section 251(b)(5) of the Act and determined that it does not apply to the tariffs at issue in this case. The same conclusion necessarily governs application of the pricing standards at Section 252(d).

Like the obligation to establish reciprocal compensation arrangements considered above, the pricing standards at Section 252(d) simply do not apply to the proposed Wireless Termination tariffs. Therefore, the Commission concludes that the proposed tariffs are not unlawful pursuant to Section 252(d) of the Act or the F.C.C.'s regulations implementing and interpreting that section of the Act.

Interconnection Agreements

The Commission has concluded that the provisions of the Telecommunications Act do not invalidate the proposed tariffs under consideration here. However, the Rural ILECs are nonetheless obligated under that Act to establish reciprocal compensation arrangements for local traffic through the medium of interconnection agreements. These agreements may be made through negotiation or, where necessary, through mandatory arbitration under the Act. As the Commission has previously acknowledged, intraMTA traffic to and from a CMRS carrier is local traffic, whether or not it is transported by one or more intervening carriers. *In the Matter of Alma Telephone Company*, Case No. TT-99-428 *et al.* (Report & Order, iss'd January 27, 2000) at p. 11; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, F.C.C., August 8, 1996, at Para. 1036.

State Law:

The General Assembly created the Commission in 1913 and delegated to it the police power to establish utility rates, subject to judicial review of the question of

reasonableness. *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951). The Commission's purpose is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity. *May Dep't Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (1937).

To that end, the Commission is authorized to ensure that the facilities provided by telephone corporations are adequate and that their rates are just and reasonable. Section 392.200.1. A "just and reasonable" rate is one that is just and reasonable to both the utility and its customers, *State ex rel. Valley Sewage Co. v. Public Service Commission*, 515 S.W.2d 845 (Mo. App., K.C.D. 1974); it is no more than is necessary to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested." *State ex rel. Washington University et al. v. Public Service Commission et al.*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (banc 1925).

Single-issue Ratemaking

The Wireless Intervenors contend that the proposed tariffs are unlawful under the state law doctrine of single-issue ratemaking.

Single-issue ratemaking is impermissible. *St. ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Comm'n*, 585 S.W.2d 41, 56-58 (Mo. banc 1979). The single-issue ratemaking doctrine has its origin in Section 392.240.1, which defines the Commission's duties as to ratemaking as follows:

Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon a complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telecommunications company for the transmission of messages or communications, or for the rental or use of any telecommunications facilities or that the rules, regulations or practices of any telecommunications company affecting such rates, charges, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of law, or that the maximum rates, charges or rentals chargeable by any such telecommunications company are insufficient to yield reasonable compensation for the service rendered, the commission shall with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and of the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, charges and rentals to be thereafter observed and in force as the maximum to be charged, demanded, exacted or collected for the performance or rendering of the service specified and shall fix the same by order to be served upon all

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telecommunications companies by which such rates, charges and rentals are thereafter to be observed, and thereafter no increase in any rate, charge or rental so fixed shall be made without the consent of the commission.

This statute has been found to mean that the Commission's determination of proper rates must be based on *all relevant factors* rather than on consideration of any single factor: "[T]he phrase 'among other things' clearly denotes that 'proper determination' of such charges is to be based upon all relevant factors." *State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704, 718-719 (Mo. 1957), *quoting New York Telephone Co. v. Public Service Commission*, 309 N.Y. 569, ___, 132 N.E.2d 847, 850 (1956). The rationale underlying the rule is that a rate based upon the fluctuation of only a single cost factor may overlook savings elsewhere, leading to rates that are not just and reasonable. *See, e.g., State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 470, 479 (Mo. App., W.D. 1998).

The Filing Companies argue that the prohibition against single-issue ratemaking does not apply to a tariff that introduces a new service. At an earlier stage of this matter, in an interlocutory order, the Commission concluded that the proposed Wireless Termination tariffs do not introduce a new service, but rather set a new charge for an existing service. *See In the Matter of Mark Twain Rural Telephone Company*, Case No. TT-2001-139 (*Order Suspending Tariffs*, issued September 19, 2000) at 6. However, having subsequently considered this point in detail, the Commission determines that these tariffs do indeed introduce a new service. The record shows that the Filing Companies have not previously had tariffs applicable to the termination of wireless-originated traffic. The record also shows, as the Wireless Intervenors point out, that such traffic has been terminated to the Filing Companies' networks for some time; however, that is only because the small LECs lack the capacity to block this traffic.

The Commission agrees with the Filing Companies that the prohibition against single-issue ratemaking does not apply to new service offerings. The legislature did not contemplate the opening of a general rate case in response to each such tariff filing. This is demonstrated by the language of Section 392.220.4, which limits the suspension period for a new service offering to 60 days compared to the otherwise generally applicable period of 120 days plus six months at Section 392.230.3, and also by the command of Section 392.185(3) that Chapter 392 be construed to "[p]romote diversity in the supply of telecommunications services and products throughout the state of Missouri."¹⁹

Because, with one exception, the proposed Wireless Termination Service tariffs herein in question introduce a new service, they are not subject to the prohibition on single-issue ratemaking.

¹⁹ Tariffs filed by small telephone companies, such as the Filing Companies, are governed by Section 392.230.5.

**Does the Prohibition on Single-issue Ratemaking Apply to
Telephone Cooperatives?**

The single exception is the tariff filed by Rock Port. As noted previously, Rock Port has had a Radio Common Carrier Interconnection Service tariff since 1992. In the Proposed Findings of Fact and Conclusions of Law filed by counsel for the Mark Twain Group, of which Rock Port is a member, it is assumed that the proposed Wireless Termination Service tariff does not introduce a new service, presumably because of a belief that the Radio Common Carrier Interconnection Service tariff applied to the same traffic as the proposed Wireless Termination Service tariff.

While the Commission has no authority to set a telephone cooperative's rates, with the limited exception of exchange access rates, the Commission has all necessary authority to examine the books and records of a telephone cooperative. Section 386.450 authorizes the Commission to

require, by order served upon any corporation, person or public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said corporation, person or public utility in any office or place within or without this state, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made . . . by the commission or under its direction.

The Commission is authorized to suspend tariffs filed by "any telecommunications company, other than a small telephone company" for 120 days plus six months "to enter upon a hearing concerning the propriety of such rate, rental, charge, regulation or practice[.]" Section 392.230.3. With respect to small telephone companies, the suspension period is limited to 150 days. Section 392.230.5. The Commission is also empowered to ascertain the value of the assets dedicated to public service by a telecommunications company and to require such companies to maintain appropriate depreciation accounts. Sections 392.270, 392.280. The phrase "telecommunications company" extends to and includes telephone cooperatives. Section 386.020(54).

The Commission's authority with respect to telephone cooperatives is such that it may, and therefore must, consider all relative factors in determining the propriety of a new rate. It follows that the prohibition on single-factor ratemaking applies equally to rates for exchange access services provided by telephone cooperatives. Therefore, Rock Port's proposed Wireless Termination tariff must be rejected as impermissible single-factor ratemaking to the extent that it sets new rates for an existing service. But, does the proposed tariff set new rates for an existing service?

**Does Rock Port's Proposed Wireless Termination Service Tariff
Introduce a New Service?**

As noted above, counsel for the Mark Twain Group, which includes Rock Port, evidently believes that the proposed Wireless Termination Service tariff does not introduce a new service. However, the point depends on the extent, if any, that the two tariffs apply to the same traffic.

Rock Port's proposed Wireless Termination Service tariff, like all of the nearly identical proposed tariffs at issue herein, describes the application of the proposed tariff on Original Sheet 1:

This tariff applies to intraMTA traffic originated by a Commercial Mobile Radio Service (CMRS) provider and terminated to end-user subscribers of the Telephone Company (i.e., wireless to wireline traffic) without the direct interconnection of the CMRS provider's and the Telephone Company's networks and where the CMRS provider is physically connected with and delivers traffic to a third party ILEC(s) which in turn delivers the traffic to the Telephone Company.

On the same page, provision B.4 states that "these Regulations and Rates are in addition to the Regulations, Rates and Charges in other Telephone Company tariffs."

By contrast, Rock Port's Radio Common Carrier Interconnection Service tariff states, at Section 1.1, that it "contains regulations, rates and charges applicable to the provision of Radio Common Carrier Interconnection Services . . . to all carriers . . . for Type 1 and Type 2B connecting circuit arrangements This tariff is also applicable to all carriers for line side interconnection[.]" At Section 1.2, Radio Common Carrier Interconnection Service is defined as "*dedicated circuits* between a RCC's²⁰ point of termination and the Telephone Company's point of switching for the exchange of traffic" (emphasis supplied).

As the quoted language demonstrates, particularly the phrase "dedicated circuits," Rock Port's Radio Common Carrier Interconnection Service tariff applies only to a situation in which a direct interconnection exists between the CMRS carrier and Rock Port. So far as this record reveals, there are no dedicated circuits in an indirect interconnection. Consequently, the Commission concludes that Rock Port's proposed Wireless Termination Service tariff does indeed introduce a new service, for there is no overlap between these two tariffs. One applies only to traffic carried by a direct interconnection, and the other applies only to traffic carried by an indirect interconnection.

²⁰ "RCC" is used in Rock Port's Radio Common Carrier Interconnection Service tariff to mean "radio common carrier."

Because Rock Port's proposed tariff introduces a new service, just as the other proposed tariffs herein at issue introduce a new service, it does not constitute impermissible single-issue ratemaking.

Just and Reasonable Rates:

Pursuant to Missouri law, the rates contained in the proposed tariffs must be "just and reasonable and not more than allowed by law or by order or decision of the commission." Section 392.200.1. Nor may the proposed tariffs "make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage[.]" Section 392.200.3. Additionally, the proposed tariffs must "plainly state the places between which telecommunications service will be rendered and shall also state separately all charges and all privileges or facilities granted or allowed and any rules or regulations or forms of contract which may in any wise change, affect or determine any or the aggregate of the rates, rentals or charges for the service rendered." Section 392.220.1. The Filing Companies have the burden of showing that the rates herein sought are just and reasonable. Section 392.230.6, RSMo 2000.

The Filing Companies point out that the rates contained in their proposed Wireless Termination Service tariffs are based upon a composite of the traffic-sensitive elements of their intraLATA access rates plus a \$0.02 adder to help defray the cost of maintaining the local loop. They further point out that the proposed rates, in general, are lower than their access rates and, in general, are lower than the rates derived by their consultant through a forward-looking cost study, the HAI Model. For these reasons, they urge, the proposed rates are just and reasonable.

It is clear that the Wireless Intervenors do not consider the rates contained in the proposed Wireless Termination Service Tariffs to be just and reasonable. However, they do not criticize the proposed rates in those terms, but rather under the pricing standards contained in the Telecommunications Act of 1996. Those standards, as explained above, simply do not apply to these tariffed rates. Likewise, it is irrelevant that the proposed rates are higher than rates paid in other states, under other conditions, for the termination of wireless-originated traffic. If the CMRS carriers do not like these rates, they have the option of compelling arbitration under the Act.

The Commission concludes that the proposed Wireless Termination Service Tariffs, and the rates they include, meet the requirements of Missouri law and should be approved. They are based upon the Filing Companies' terminating access rates which, in the *United* case and its progeny, were held appropriate for this traffic. See *In the Matter of United Telephone Company*, Case No. TC-96-112 (*Report & Order*, iss'd April 11, 1997). They are based upon the traffic-sensitive elements of the access rate and include a flat \$0.02 adder for use of the local loop. The Wireless Intervenors have sought to show that the proposed rates exceed industry averages and are higher than those in other states. However, the Wireless Intervenors have not shown how, if at all, these figures apply to the Filing Companies. The record shows that the Filing Companies' costs are high and that these high costs are reflected in the proposed rates.

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The proposed rates are not so high as to be facially outrageous and the record shows that small LECs are subject to high costs. The Commission concludes that the proposed rates are just and reasonable and that the proposed tariffs should be approved. The CMRS carriers enjoy many rights under the Act that will permit them to act quickly with respect to these rates. Indeed, these rates may have the added benefit of finally bringing these parties to the bargaining table.

Traffic Blocking:

One aspect of the proposed tariffs that has occasioned some concern is the provision that the intervening LEC, generally SWBT, must assist the small ILEC in blocking the traffic of a defaulting CMRS carrier if the small ILEC cannot do so on its own. SWBT, in particular, dislikes this provision. As SWBT stated in its brief, “[t]he only aspect of the proposed tariffs that Southwestern Bell Telephone has challenged is Section G(3) in which the Filing Companies purport to give themselves carte blanche authority to require intermediate transport providers . . . to block transiting traffic upon request.”

SWBT argues that the blocking provision violates Section 251(a)(1) of the Act. This argument must fail, however. The Act does not prohibit blocking the traffic of a carrier that has violated applicable tariff provisions, such as failing to pay as required. Indeed, the traffic blocking provision is similar to a provision in SWBT’s Wireless Services tariff.

With respect to SWBT, at least, the traffic-blocking provision can be viewed as simply a request that SWBT enforce the provisions of its own tariff, because the wireless-originated traffic at issue in this case is violative of SWBT’s own tariff. The originating CMRS carriers do not, as SWBT’s tariff expressly requires, have existing agreements with the terminating small LECs. SWBT is correct, however, that the requesting small LEC must pay SWBT the cost of blocking the traffic. As to the nature of the information which the requesting small LEC should provide, it should be sufficient to satisfy the large LEC that the targeted CMRS carrier is indeed in default of a valid tariff provision and that required notice has been provided and actually received.

SWBT also contends that traffic should be blocked only after the requesting LEC has sought and obtained an order from this Commission. The Commission disagrees. SWBT’s own tariff, which provides for traffic blocking, does not require a prior ruling from this Commission. No doubt, in a questionable case, there would be time to refer the matter to the Commission.

Finally, SWBT contends that the requesting LEC must indemnify it for any liability incurred by SWBT as a result of blocking traffic as requested. The Commission disagrees with this position, as well. As stated previously, traffic blocking requests directed to SWBT, at least, can be viewed as requests that SWBT enforce its own tariff. SWBT’s tariff provides:

Upon nonpayment of any sum due the Telephone Company, or upon violation of any conditions governing the furnishing of service, the Telephone Company may, by notice to the wireless carrier, *without incurring*

any liability, forthwith discontinue the furnishing of said service.

Exhibit 14 (SWBT's Wireless Carrier Interconnection Service Tariff, P.S.C. Mo. No. 40, 3.3.D. (4th Revised Sheet 6)) (emphasis added). SWBT's tariff already appears to provide all necessary protection from liability for blocking traffic.

Provision of Billing Data:

The Wireless Intervenors assert that the proposed Wireless Interconnection Service tariffs require them to provide certain detailed billing data to the Filing Companies. They wonder whether this is "lawful and appropriate," in the words of the Issues List. If it is, they wonder whether they should be compensated for providing this data?

Section E of the proposed Wireless Termination Service tariffs does not require the CMRS carriers to provide billing data. That section, at E.2, states that "[i]f possible, the CMRS provider will provide to the Telephone Company billing records in standard industry formats[.]" The language is hardly mandatory; rather, it is hopeful. The tariff provides that the Filing Company "shall issue a bill to the CMRS provider based on the best information available[.]" In the event of a billing dispute, the CMRS carrier will undoubtedly produce its records quickly enough.

The proposed tariffs do not require the CMRS carriers to provide billing data to the Filing Companies. Therefore, no question of compensation for providing such data arises under the tariffs. However, to the extent that the tariffs do impose requirements upon the CMRS carriers, and they incur costs in meeting such requirements, it is appropriate that those costs be passed on to the Filing Companies.

Should the Commission Impose Default Rates?

Staff has suggested that the Commission impose default rates for the termination of wireless-originated traffic upon the parties as an interim solution, pending the negotiation or arbitration of agreements under the Act. The parties have, in the Issues List, identified this suggestion as a matter for resolution by the Commission. Therefore, the Commission will address this last issue.

As a matter of public policy, the solution selected here by the Commission is to be preferred over that suggested by Staff. The rates contained in the tariffs proposed by the Filing Companies are clearly higher than the Wireless Intervenors would like. Thus, an incentive is created for the CMRS carriers to do what Congress expects them to do, namely, negotiate agreements with the small LECs. It is important to bear in mind, as the parties have unanimously advised the Commission, that the CMRS carriers can compel the small LECs to make an agreement, but the small LECs cannot compel the CMRS carriers to make an agreement. Thus, the solution must create an incentive for the CMRS carriers to act. The tariffs proposed by the Filing Companies will do that, while the alternative solution suggested by Staff will not.

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IT IS THEREFORE ORDERED:

1. That the alternative motions to reject tariff filed by AT&T Wireless Services, Inc., on September 8, 2000; by Southwestern Bell Wireless, Inc., on September 11, 2000; by Nextel West, Inc., on September 11, 2000; by Sprint Spectrum L.P., doing business as Sprint PCS, on September 13, 2000; and by Cellco Partnership and Cybertel Cellular Telephone Company, doing business as Verizon Wireless, on September 14, 2000, are denied.
2. That the Motion to Dismiss filed by AT&T Wireless Services, Inc., Southwestern Bell Wireless, Inc., Nextel West, Inc., and Sprint Spectrum L.P., doing business as Sprint PCS, on November 20, 2000, is denied.
3. That the Wireless Termination Service tariffs filed by Alma Telephone Company and Choctaw Telephone Company are hereby approved for service rendered on and after February 17, 2001.
4. That the Wireless Termination Service tariffs filed by Mark Twain Rural Telephone Company, Seneca Telephone Company, New Florence Telephone Company, Granby Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Fidelity Telephone Company, BPS Telephone Company, Ellington Telephone Company, Kingdom Telephone Company, Oregon Farmers Mutual Telephone Company, Alma Telephone Company, Cass County Telephone Company, MoKan Dial, Inc., Peace Valley Telephone Company, Farber Telephone Company, Rock Port Telephone Company, Le-Ru Telephone Company, Goodman Telephone Company, Steelville Telephone Exchange, Inc., Miller Telephone Company, Lathrop Telephone Company, Ozark Telephone Company, Green Hills Telephone Company, KLM Telephone Company, Holway Telephone Company, McDonald County Telephone Company, Craw-Kan Telephone Cooperative, Inc., IAMO Telephone Company, and Choctaw Telephone Company, are hereby approved for service rendered on and after February 19, 2001.
5. That this order shall become effective on February 17, 2001.
6. That this case may be closed on February 20, 2001.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC.,
concur and certify compliance with the provisions of Section
536.080, RSMo 2000.
Murray, C., absent.

**In the Matter of the Consideration of an Accounting Authority
Order Designed to Accrue Infrastructure Replacement Costs
for St. Louis County Water Company.***

*Case No. WO-98-223
Decided February 13, 2001*

Accounting §42. Water §32. A third, successive Accounting Authority Order was not appropriate where a Company sought to defer infrastructure replacement costs and the record showed that infrastructure replacement would both require large capital investments by the Company and cause sizeable expenses to the Company over a course of several years, because these were not the sort of extraordinary and non-recurring costs that are appropriately deferred under an Accounting Authority Order.

APPEARANCES

Richard T. Ciottone, Jr., Senior Vice President and General Counsel, and *David P. Abernathy*, Assistant General Counsel, St. Louis County Water Company, 535 North New Ballas Road, St. Louis, Missouri 63141, for St. Louis County Water Company.

W.R. England, III, and *Dean L. Cooper*, Attorneys at Law, Brydon, Swearngen & England, P.C., 312 East Capital Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for St. Louis County Water Company.¹

John B. Coffman, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGES: Nancy Dippell, Senior, and Kevin A. Thompson, Deputy Chief.²

REPORT AND ORDER

Procedural History

This case was established on December 4, 1997, as a "spin-off docket" by the Report and Order issued by the Commission in Case No. WR-97-382, St. Louis County Water Company's (Company) general rate case. That case was resolved

*On March 1, 2001, the Commission denied a rehearing in this case. On March 27, 2001, this case was appealed to Cole County Circuit Court (01CV323715).

¹Mr. England and Mr. Cooper entered their appearances on November 2, 1999, as additional counsel for Company.

²Judge Dippell presided over the hearing; Judge Thompson prepared the Report and Order.

by a Unanimous Stipulation and Agreement, filed on October 6, 1997. In the rate case, Company sought to "be allowed to accrue infrastructure replacement costs in an accounting authority order (AAO), as initially authorized in Case No. WR-95-145[.]" However, the Staff of the Missouri Public Service Commission (Staff) and the Office of the Public Counsel (Public Counsel) were unwilling to agree to the AAO; therefore, that issue was spun off into this separate case and the rate case was settled by agreement.

On February 25, 1998, Staff moved for the establishment of a procedural schedule. On March 30, 1998, Public Counsel filed Direct Testimony; Company and Staff filed Direct Testimony the following day. The Commission adopted a procedural schedule by order issued on April 9, 1998. The parties filed Rebuttal Testimony on April 23, 1998, and a Hearing Memorandum on April 29, 1998.

An evidentiary hearing was held on May 18, 1998, Senior Regulatory Law Judge Nancy Dippell, presiding. All parties were represented at the evidentiary hearing and were afforded a full and fair opportunity to be heard in accordance with the Commission's practice rules. Thereafter, Late-filed Exhibits 9, 10 and 11 were filed on May 26, 1998. The Commission issued its Order establishing a briefing schedule and directing the filing of exhibits on June 19, 1998. Thereafter, Late-filed Exhibits 9, 10 and 11, and a Memorandum were filed on June 24, 1998. The parties filed their Briefs on July 13, 1998, and their Reply Briefs on July 27, 1998. On July 23, 1998, Staff moved to strike portions of the Company's Brief. The Company responded in opposition to Staff's motion on July 30, 1998.

On November 2, 1999, new counsel entered an appearance on behalf of Company and moved to extend the AAO deferral period and to postpone decision. Staff responded in opposition on November 12, 1999, and Public Counsel responded in opposition on November 15, 1999. Company replied to both Staff and Public Counsel on November 24, 1999. On November 30, 1999, the Commission denied Company's motion and notified the parties that the case had been transferred to Deputy Chief Regulatory Law Judge Kevin A. Thompson. Thereafter, on February 23, 2000, Company filed a clarification of its motion to extend the AAO deferral period and to postpone decision. No party responded.

Late-Filed Exhibits:

Late-filed Exhibits 9, 10 and 11 were filed on May 26, 1998, and again on June 24, 1998. A Memorandum was also filed on June 24, 1998. No party objected to the receipt of these items and the time for doing so has long since passed.³ Therefore, they are received and made a part of the record of this proceeding.

Motion to Strike:

Staff moved on July 23, 1998, to strike from Company's initial brief "numerous citations to testimony from Case Nos. WR-95-145, WR-96-263, and WR-97-282, and to the Company's Brief in Case No. WR-95-145," on the grounds that these items are outside of the record of this case. Company replied on July 30, 1998,

³Pursuant to the Commission's Order of June 19, 1998, objections were due on or before July 6, 1998.

providing a citation to the record of the present case for each challenged statement in its brief and characterized the citations to the records of other cases as "historical references."

Section 536.070(5), RSMo 2000, provides that:⁴

Records and documents of the agency which are to be considered in the case shall be offered in evidence so as to become a part of the record, the same as any other evidence, but the records and documents may be considered as a part of the record by reference thereto when so offered.

Likewise, Commission Rule 4 CSR 240-2.130(2) provides that "information contained in a document on file as a public record with the commission" need not be produced, but may be "received in evidence by reference, provided that the particular portions of the document are specifically identified and are relevant and material." The particular items in question were never offered or specifically identified during the hearing of this matter and, consequently, are not part of this record. See A.S. Neely, *Administrative Practice & Procedure (20 Missouri Practice Series)*, § 11.04 (1995). Both Section 536.070(5) and Rule 4 CSR 240-2.130(2) require that matter contained in the agency's files actually be offered during the hearing in order to become part of the record. Therefore, the motion to strike must be granted.

Staff has requested only that the *citations* to matter outside the record be stricken. Company's arguments, however, are unaffected. Arguments need not be supported with citations and, furthermore, Company has provided replacement citations to the record of this case.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

An Aging Infrastructure:

St. Louis County Water Company is nearly 100 years old. Its first generation mains, in its oldest service areas like University City, are simply wearing out. Consequently, the Company is experiencing an exponential increase in water main breaks and repair costs. The worn-out piping and mains require replacement. However, the cost of replacing these mains is great. The Company states that it

⁴All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

will require a large amount of new capital to invest in infrastructure replacement.

The high cost of water main replacements makes a water utility the most capital-intensive type of utility. The Company paid about \$5.00 per foot to install its first generation mains. However, it presently costs about \$100.00 per foot to replace these mains. The replacement of only 1 percent of the Company's infrastructure will cost about \$20 million. The replacement of all of the Company's aging infrastructure will literally cost billions of dollars. Additionally, about 32 percent of the Company's first generation piping was contributed by others (about \$70 million of a total \$219 million) and is excluded from rate base. Thus, the Company must raise capital to replace mains that it did not originally finance.

Compounding the problem for the Company is the fact that it can expect no additional revenues. In 1993, the Company's customer base was still growing at an annual rate of 1.0 to 2.0 percent. However, St. Louis County is now losing population on an annual basis. The replacement of worn out infrastructure does not generate any new revenue, but serves only to maintain service at its present level. Water is distributed today in the same way that it was 100 years ago, and there are no technological innovations on the horizon which will permit the Company to distribute water in a different manner, thereby avoiding the need to replace the old mains. Likewise, unlike the telecommunications industry, technological innovation has not resulted in new products for the water industry to sell, thereby raising new revenue.

The Company's witnesses testified that the need to invest large amounts of new capital with no resulting new revenues has placed the Company in a difficult situation. Moreover, the Company insists that the situation is greatly exacerbated by regulatory lag. Regulatory lag is "the lapse of time between a change in revenue requirement and the reflection of that change in rates." *In the Matter of St. Louis County Water Company*, Case No. WR-96-263 (*Report & Order*, issued December 31, 1996), at p. 8. A main replacement job is typically completed, and the new pipe placed in service, in a two-month period. However, no return can be earned on the new utility assets placed in service until the Commission permits the Company to add the new assets to its rate base. This requires a general rate case and a delay, after the case is filed, of 11 months. Yet, depreciation and other expenses associated with the new assets begin as soon as they are placed in service. Thus, during the lag period, the Company experiences diminished earnings. The Company contends that regulatory lag causes the investment of large amounts of new capital to replace worn out mains to be unattractive to its shareholders and to investors in general.

The 1994 Main Replacement Plan:

On September 24, 1994, the Company presented its Main Replacement Plan (1994 Plan) to the Commission. The 1994 Plan called for the replacement of 30 miles of obsolete main per year, a rate of 0.7 percent, at an annual new capital cost of \$15 million. This represented, according to the Company, an increase of 26 miles, and \$13.5 million, over its existing main replacement effort in 1993. Company further noted in the 1994 Plan that it expected main replacement costs to increase at a rate of 5 percent per year, leading to annual program costs of \$20

million annually by the end of the century. The 1994 proposal noted that the Company was then already in difficult financial circumstances and that it had been unable to meet the interest coverage ratios specified in its mortgage for well over a year.

The 1994 Plan stated that the Company installed approximately seven miles of replacement piping annually, evenly distributed between obsolete main replacement and relocations caused by highway construction. This level of infrastructure replacement was inadequate. The Company's analysis showed that it needed to install approximately 30 miles of replacement piping annually. At \$100 per foot, this would cost about \$15,840,000 annually.⁵ In addition, the 1994 Plan stated that aging infrastructure would continue to cause increased maintenance costs.

In 1993, the Company served about 295,000 customers with 3,882.27 miles of main, a density of 75.9 customers per mile of main. Also by 1993, the Company had only retired 305.74 miles of main throughout its history. Much of the Company's network is of an older vintage. About 81.5 percent of the total mileage consists of pipes of 8 inches or less in diameter; 95 percent consists of cast iron or ductile cast iron pipes. The Company asserts that the best type of main is polywrapped ductile cast iron with a cement lining and a rubber ring joint; 19.6 percent of Company's network is comprised of such pipe.

As the Company's network has aged, maintenance calls have increased exponentially. At the same time, the cost per maintenance call has also increased. In 1985, the Company spent \$2.61 million on maintenance; by 1993, the figure was \$5.76 million. Many factors contribute to main breaks. The primary one is simply a pipe's loss of metal over time due to corrosion. Accounted-for-water⁶ had also declined from 87.5 percent in 1980 to 84.5 percent in 1993, suggesting increasing water loss from breaks and leaks. Likewise, longitudinal main failures had increased over the ten years ending in 1993. A longitudinal main failure is a break along the length of a pipe. Such breaks are more expensive to repair and cause more water loss.

The vintage of mains most subject to breakage are the 1,226 miles of centrifugally-cast iron, rigid-joint mains installed between 1929 and 1956. In 1993, this 30 percent of the total network accounted for 69 percent of the main breaks. The 1929 to 1956 vintage mains experience 52 breaks per year for every 100 miles of pipe. Ironically, the oldest mains in the system, built of pit-cast iron pipe, experience only eight breaks per year per 100 miles of pipe. The 1957 through 1972 vintage pipe experiences about 16 breaks per 100 miles of pipe, while the ductile iron pipe experiences only two breaks per 100 miles of pipe. The Company's 1994 average break rate of 60.0 per 100 miles of pipe per annum greatly exceeded the industry average for systems of similar size of 29.4 breaks per annum per 100 miles of pipe. In 1993, the Company experienced about 2,000 breaks per year. By 2000, the Company expected to experience 3,000 to 4,000 breaks per year. The Company also predicted that the cost for each such incident would reach \$4,000 by 1999.

⁵\$100,000 x 5,280 x 30 = \$15,840,000.

⁶"Accounted-for-water" is a comparison of pumped quantities to sold quantities. The difference between the two is unaccounted for water.

The 1994 Plan stated that maintenance costs were increasing, not just because the number of breaks was increasing, but also because the number of man-hours required to repair each break was increasing. In 1993, the Company devoted 103,675 man-hours to repairing main breaks and leaks, the equivalent of eight maintenance crews. By 1999, the Company expected 4,000 breaks to consume 240,000 man-hours, the equivalent of 19 full maintenance crews. Thus, the Company predicted that it would need to devote as much as \$12 million to \$16 million annually to maintenance by the year 2000.

Assuming a useful life of 80 years for the 1929 to 1956 vintage mains, the Company calculated in 1993 that it needed to replace 30 miles of such pipe annually over a 40-year period.⁷ At that time, its obsolete main replacement rate amounted to about 3.6 miles annually, for a replacement rate of 0.26 percent. This level of obsolete main replacement was significantly below the 1993 industry average of 0.6 percent annually.

To mitigate rate shock, and to permit the Company to gradually gear up for the new program, the 1994 Plan recommended that the increase from 4 miles to 30 miles be phased in over a five-year period. Starting in 1996, the Company proposed to add three construction crews annually, reaching a total of 18 in 1999. As one crew can replace 1.6 miles of pipe in a year, 18 crews are necessary to replace 30 miles of pipe annually.

The 1994 Plan reported that the Company would increase its obsolete main replacement program to 5 miles annually, even without implementation of the proposed Main Replacement Plan. Under the 1994 Plan, the Company proposed to increase the mileage of obsolete mains replaced each year, reaching an annual level of 30 miles in 1999. The Company projected the capital costs of these alternatives as follows:

<u>Year:</u>	<u>Main Replacement Capital Costs at Flat 5-Miles/Year:⁸</u>	<u>Main Replacement Capital Costs of Proposed 1994 Plan:⁹</u>
1995	\$ 2,500,000	\$ 3,750,000
1996	\$ 2,800,000	\$ 8,400,000
1997	\$ 3,100,000	\$ 11,900,000
1998	\$ 3,400,000	\$ 15,500,000
1999	\$ 3,700,000	\$ 19,200,000

Central to the Company's proposed 1994 Plan was the minimization of regulatory lag. The Company calculated the increased capital outlay required by the 1994 Plan as \$43,250,000 over five years. The Company stated that it would only commit to this outlay if the Commission would act to minimize or eliminate

⁷30x40 = 1200. There are 1,226 miles of 1929 to 1956 vintage pipe to replace.

⁸Five miles of main replaced each year; costs per mile increased by 10 percent each year.

⁹Starting with 7.5 miles in 1995 and reaching 30 miles annually in 1999; costs per mile increased by 10 percent each year.

regulatory lag. The Company proposed several alternatives to accomplish this, including the use of a future test year in ratemaking, the extension of post-test year plant adjustments up to the suspension date, the implementation of an infrastructure adjustment clause, and the implementation of a deferral mechanism.

One aspect of the 1994 Plan was an Accounting Authority Order (AAO). The Company proposed to seek an AAO under which to accrue main maintenance costs, in order to reduce the negative impact of regulatory lag while the Company replaced its first generation mains. The Company proposed to credit a level amount of expense monthly, based on maintenance expenses incurred during a test year ending November 1993, to a regulatory liability and to debit that amount to maintenance of mains expense. As actual costs were incurred, Company proposed to debit the costs to the regulatory liability and to credit them to cash. The Company stated that the effect of the AAO would be to match actual main maintenance expenses to the amounts collected from ratepayers for that purpose.

The Company's Rate Cases, 1994 to 2000:

The Company filed its general rate case, Case No. WR-95-145, on October 28, 1994. In that case, Company proposed the use of a future test year, its favored option from the 1994 Plan. The Commission rejected the Company's proposed future test year methodology as necessarily including speculative amounts in the rate calculation, as well as the Accelerated Cost Recovery (ACR) methodology proposed by the Public Counsel. Instead, the Commission determined that Company's planned level of infrastructure replacement expenditure for the five years ending in 1999, as described in the 1994 Plan, constituted "a significant and unusual increase in County Water's business-as-usual construction expenditures, and is extraordinary in nature." *In the Matter of St. Louis County Water Company*, Case No. WR-95-145 (*Report & Order*, issued September 19, 1995), at pp. 7-9. The Commission granted the Company an AAO for a period of 24 months, beginning on October 1, 1995, and applying only to main replacement. The AAO authorized the Company to defer depreciation and carrying costs associated with main replacement until its next rate case, thereby mitigating the effect of regulatory lag.¹⁰ *Id.*, and *Ordered Paragraph 3*.

The Commission also rejected the 1994 proposed Main Replacement Plan as lacking "sufficient specificity and detail about the program and its implementation[.]" *Id.*, at p. 12. The Commission advised the Company "in County Water's next appearance before the Commission, [to] present its replacement program for approval and provide specific, detailed evidence on the systematic implementation of the program during each year of each phase of the program." *Id.* The Commission further advised the Company that, in such a case, "it would be more receptive to including in rate base the expenditures associated with County Water's infrastructure replacement program[.]" *Id.*, at p. 11. However, the Company did not present such a revised plan to the Commission until June 23, 2000.

The Company filed its next general rate case, Case No. WR-96-263, on February 9, 1996. The Commission again refused to adopt a future test year methodology as urged by the Company, noting "County Water is currently unable

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to sufficiently and accurately determine the location and type of distribution pipeline in its system. [The Company] apparently does not possess the necessary information to execute an effective and efficient replacement plan." *Supra*, at p. 9. The Commission again advised the Company that "[u]ntil such a plan can be created . . . the Commission is unwilling to include anticipated capital expenditures in rate base." *Id.*

The Commission permitted the Company to recover the remaining amount deferred under the AAO granted in Case No. WR-95-145 over a 20-year period beginning in January 1997.¹¹ *Id.*, at pp. 15-17. The Commission also refused to grant an AAO for maintenance expenses because it found those expenses were not extraordinary in nature. *Id.*, at pp. 9-15. However, in a subsequent order, the Commission authorized a second AAO for main replacement capital expenditures "[b]ecause the infrastructure replacement costs appear to be of such an extraordinary, infrequent and unusual nature when the rate of their increases is considered[.]" *In the Matter of St. Louis County Water Company*, Case No. WR-96-263 (*Order Regarding Clarification and Rehearing*, issued March 7, 1997), at p. 2.

The Company filed its next general rate case, Case No. WR-98-237, on March 14, 1997. That case was settled by the unanimous agreement of the parties, excepting only the Company's request for a third AAO for infrastructure replacement, which issue was spun off and forms the subject of the present case. *In the Matter of St. Louis County Water Company*, Case No. WR-98-237 (*Report & Order*, issued December 4, 1997), at p. 4 and Ordered Paragraph 4. The spinoff was necessary because the Public Counsel refused to agree to a third infrastructure replacement AAO.¹²

On June 23, 2000, the Company filed its next rate case, Case No. WR-2000-844.¹³ That case is now pending. These proposed tariffs, Tariff File No. 200001199, seek an annual increase in water service revenue of \$17,558,149, approximately 17 percent. *In the Matter of St. Louis County Water Company*, Case No. WR-2000-844 (*Suspension Order and Notice*, issued July 5, 2000). Company maintains that this increase is necessary due to increased capital expenditures and operating costs. The increased capital expenditures primarily relate to infrastructure replacement, while the increased operating costs are related to the costs of maintaining Company's existing facilities. The Commission has suspended these proposed tariffs until May 20, 2001. *In the Matter of St. Louis County Water Company*, Case No. WR-2000-844 (*Suspension Order and Notice*, issued July 5, 2000).

Together with its proposed tariff sheets, the Company also filed prepared direct testimony in support of its requested rate increase. The prefiled testimony includes

¹¹The "remaining amount" was that portion not included in rate base. *In the Matter of St. Louis County Water Company*, Case No. WR-96-263 (*Report & Order*, issued December 31, 1996), at pg. 16.

¹²Public Counsel appealed the first two infrastructure replacement AAOs.

¹³In order to bring the story of the Company's infrastructure replacement efforts up to date, the Commission hereby takes notice of the pleadings and prepared testimony filed in Case No. WR-2000-844.

a new Main Replacement Plan (New Plan). This testimony indicates that Company will embark on its Main Replacement Plan in 2001, raising its infrastructure replacement budget from \$7 million in 1999 to \$9 million. The annual budget will increase thereafter, to \$15 million in 2002, to \$20 million in 2003, and to \$25 million in 2004 and later years. The figure of \$25 million equates to 47.5 miles of mains replaced annually, about a 1.0 percent replacement level. Company suggests that this figure compares favorably to the national average of 0.7 percent.

The Accounting Authority Order:

Company herein seeks its third successive infrastructure replacement AAO because "main replacement requires multiple projects rather than a single large one," resulting in regulatory lag that is too large for the Company to absorb and still attract capital. Company views an AAO as a temporary expedient until such time as the Commission approves a detailed infrastructure replacement plan which will recognize some portion of projected costs in rates.

Company's preferred solution is the use of a future test year. Alternatively, Company suggests the increased use of pro forma data.

Since 1995, the Commission has twice provided the Company with the opportunity to earn a return on equity of 11.6 percent. However, the Company was not able to actually realize that level of earnings in practice. Its actual earned return on equity in 1995 was 10.82 percent; for 1996, 7.43 percent; for 1997, 10.78 percent. The Company considers these return levels to be insufficient. Had the first and second infrastructure replacement AAOs not been in place, the Company projects that actual earnings would have been significantly lower:

1995	10.80 percent
1996	7.26 percent
1997	10.67 percent

Under traditional cost of service ratemaking, the Company routinely fails to earn its authorized rate of return. In fact, the Company achieved its authorized rate of return only four times in the 29 years ending 1998. Capital expenditure on infrastructure replacement simply exacerbates the existing problem. The ongoing nature of main replacement, as a series of short projects rather than one massive project, prevents the Company from timing its rate cases to reduce lag. Company contends that it is this aspect of the problem that makes the AAO necessary. Further, traditional ratemaking assumes that lag between rate orders will be ameliorated by the ongoing expansion of the system, resulting in increased earnings from new customers and increased sales. However, the Company is experiencing dwindling growth. Further, the replacement of the first generation of mains will be necessary to maintain existing service and will not result in new customers, increased sales, or new revenue. Water service is a rising-cost industry. Even with the two infrastructure replacement AAOs in place, the Company claims it has not been able to achieve its authorized rate of return.

For a utility, a sufficient return not only covers operating costs, but also capital costs, that is, the debt and equity funds supporting the utility assets actually used

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in the public service. Inadequate earnings, in turn, endanger the utility's ability to attract capital at reasonable rates and terms. In 1993, for example, the Company had an actual overall earned return of 6 percent and an earned equity return of only 4.5 percent. This level of return is inadequate to attract the capital necessary to fund an infrastructure replacement program over an extended period of time.

A Large Undertaking:

The Company suggests that main replacement is an extraordinary undertaking in terms of expense and duration. It is a difficult problem for the entire water utility industry, not just for the Company. In 1997, the United States Environmental Protection Agency reported that the water industry needed to invest over \$77.2 billion in infrastructure replacement over the next 20 years. The replacement of 1 percent of the pipeline infrastructure will cost approximately \$19.9 million,¹⁴ while the Company's annual capital budget is only \$20 million. While each replacement project may not itself be extraordinary, all of the projects taken together are extraordinary. The Company has increased its main replacement budget from \$2.5 million in 1995 to \$6.7 million in 1998, an increase of 268 percent. The main replacement program represents 30 percent of Company's investor-supplied capital budget. The Company has added 30 full-time employees and 14 temporary employees to its infrastructure replacement effort, as well as provided necessary equipment such as backhoes and trucks.

However, Company has not increased its annual infrastructure replacement program above \$6.7 million, despite the two AAOs granted by the Commission, because of the climate of legal uncertainty created by the Public Counsel's challenge of those AAOs. In Company's view, the infrastructure replacement program will continue to be a risky and unattractive investment until its legality is settled. For example, by December 1997, \$385,000 had accumulated under the two AAOs. If the courts held against the AAOs, that amount, equal to five percent of Company's 1996 net income, would have had to be written off.

Main replacement is not within the scope of the ordinary course of business of a water utility. First of all, the need to replace infrastructure does not arise at all within the first 80 years of the life of a water utility. Just as the infrastructure was added gradually over that 80-year period, so the infrastructure must be gradually replaced as the useful life of the pipes is reached. For each pipe, replacement is necessarily an extraordinary event.

The Company has not, in fact, achieved the level of capital expenditure on main replacement projected in the 1994 Plan. However, the Commission specifically rejected the 1994 Plan. Furthermore, although the two AAOs have assisted the Company in maintaining financial integrity, they have not eliminated the effects of regulatory lag or provided for the recovery of the true costs of maintenance. The Company presented the 1994 Plan with the caveat that these conditions must be met for the plan to be implemented.

The Company's 1997 Five-Year Plan (1997 Plan) is an internal planning document used to provide guidance to Company management regarding future

¹⁴1998 dollars.

capital requirement needs. The 1997 Plan includes projections of main replacement investments through 2002. Under the 1997 Plan, main replacement expenditures start in 1998 at \$6.7 million and increase to \$7.9 million by 2002. The 1997 Plan assumes that the AAO mechanism continues and does not show the increased level of expenditure on main replacements that Company claims it will initiate once various uncertainties surrounding the issue are resolved.

A New Plan:

In the context of Case No. WR-96-263, the Company and Public Counsel entered into a Stipulation and Agreement (1996 S&A) on September 13, 1996, regarding distribution planning, including both infrastructure replacement and maintenance. The Commission approved the 1996 S&A in Case No. WR-96-263 and the Company has met all relevant milestones set by this agreement.

Pursuant to the 1996 S&A, the Company is developing a new infrastructure replacement plan. As a first step, Company is developing information systems necessary to support and monitor an effective infrastructure replacement program with the assistance of a consultant, EMA, Inc. The Company is seeking vendors for a work management system (WMS) and a geographic information system (GIS). The WMS and GIS will contain details of pipelines and maintenance histories and will permit Company to evaluate distribution system performance and to develop replacement plans. After the software is obtained, Company must then convert all of its data and input it into the new system.

Company filed its New Plan on June 23, 2000, as part of its current rate case, Case No. WR-2000-844. The basis of the New Plan is the use of information systems to identify pipes for replacement at the "point it makes more economic sense to replace a given length of pipe than to keep repairing it when it breaks." Company's rate increase request includes revenue required for the infrastructure replacement program as well as for completion of the GIS. The GIS is not expected to be operational until 2002 and will require additional investment of approximately \$3.5 million to complete. Company has indicated that \$4,809,134 is required in additional revenue for each of the years 2001 through 2003 solely to support the infrastructure replacement program and the completion of the GIS. The figure of \$4,809,134 is the average for the three-year period.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Jurisdiction:

Company is a water corporation within the meaning of Section 386.020(58) and is, therefore, subject to the supervision of the Commission. Sections 386.250(3) and 393.140.

What is an Accounting Authority Order (AAO)?

The Commission is authorized to "prescribe uniform methods of keeping accounts, records and books, to be observed by . . . water corporations[.]" Section 393.140(4). Pursuant to this authority, the Commission has promulgated its Rule 4 CSR 240-50.030, which requires water corporations to utilize the Uniform System

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of Accounts (USOA) issued by the National Association of Regulatory Utility Commissioners (NARUC) in 1973. The Commission is also authorized "after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited." Section 393.140(8).

An Accounting Authority Order (AAO) is an order of the Commission authorizing an accounting treatment for a transaction or group of transactions other than that prescribed by the USOA. It is an accounting mechanism that is generally used to permit deferral of costs from one period to another. *In the Matter of Missouri Public Service*, 1 Mo.P.S.C.3d 200, 202 (Dec. 20, 1991). The items deferred are booked as a regulatory asset rather than as an expense, thus improving the financial picture of the utility in question during the deferral period. *Id.* During a subsequent rate case, the Commission determines what portion, if any, of the deferred amounts will be recovered in rates.

For example, expenses associated with a large project, such as a new utility plant, must be booked under the USOA from the day that the plant is first placed in service. These expenses include depreciation and the carrying costs of construction financing and can be quite significant in size. However, the new plant cannot be included in rate base until after a general rate case has been completed, an 11-month process. An AAO may be used in such a situation to assist the utility through the lag period between the on-line date and the effective date of the new rate order. *See, e.g., In the Matter of Missouri-American Water Company*, Case Nos. WR-2000-281 and SR-2000-282 (*Report & Order*, issued August 31, 2000), at pp. 48-50.

AAOs should be used sparingly because they can permit ratemaking consideration of items from outside the test year:

The deferral of cost from one period to another period for the development of a revenue requirement violates the traditional method of setting rates. Rates are usually established based upon a historical test year which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses. *State ex. rel. Union Electric Company v. PSC, (UE)*, 765 S.W.2d 618, 622 (Mo. App. 1988).

In the Matter of Missouri Public Service, 1 Mo.P.S.C.3d at 205.

The USOA authorizes utilities to defer extraordinary and nonrecurring expenses without prior permission of the Commission. *See USOA*, Section 186; *State ex rel. Office of the Public Counsel v. Public Service Commission*, 858 S.W.2d 806, 810 (Mo. App., W.D. 1993); *In the Matter of Missouri Public Service*, 1 Mo.P.S.C.3d at 203. The Commission has previously taken the position that, where authority from the Commission is not necessary for deferral, the Commission need not hold an evidentiary hearing prior to granting an AAO authorizing deferral. *In the Matter of Missouri Public Service*, 1 Mo.P.S.C.3d at 204.¹⁵

¹⁵This theory has not yet been tested on appeal. *See Office of the Public Counsel v. Public Service Commission*, 858 S.W.2d 806, 809-10 (Mo. App., W.D. 1993).

Should the Commission Grant the Requested AAO?

The record makes it abundantly clear that the Commission should not grant the requested third AAO for infrastructure replacement because the circumstances are recurring, not nonrecurring. The Company has presented ample evidence as to the magnitude of the infrastructure replacement undertaking in terms of cost. However, the record also shows that infrastructure replacement will necessarily continue for years as a series of successive projects. This is not an appropriate case for an AAO. To the extent that Company has deferred the costs concerned under the USOA without prior Commission authorization, Company may seek to recover those costs in its current general rate case.

Infrastructure replacement is a matter of such magnitude, in terms of cost and duration, that it should be dealt with within the ratemaking process. This requires a detailed, highly specific plan that can be appropriately included in ratebase. However, as noted, the Commission rejected the 1994 proposed Main Replacement Plan as lacking "sufficient specificity and detail about the program and its implementation[.]" *In the Matter of St. Louis County Water Company*, Case No. WR-95-145 (*Report & Order*, issued September 19, 1995), at p. 12. The Commission has been waiting for the presentation of an appropriate plan ever since.

Company is presently engaged in a general rate case and has presented an infrastructure replacement plan therein. That case is the proper place to address the merits of that proposal.

IT IS THEREFORE ORDERED:

1. That the Accounting Authority Order sought herein by St. Louis County Water Company, which now does business as Missouri-American Water Company, is denied.
2. That any other motions not previously determined herein are denied.
3. That this Report and Order shall become effective on February 23, 2001.
4. That this case may be closed on February 24, 2001.

Lumpe, Ch., Schemenauer, and Simmons, CC., concur;
Drainer and Murray, CC., dissent; and certify compliance with the
provisions of Section 536.080, RSMo 2000.

In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996.*

Case No. TO-99-227
Decided February 13, 2001

Telecommunications § 1. The Commission denied the motion to stay the proceeding and establish time for an additional comment cycle because the Commission had held an on-the-record conference where it heard comments of the parties and the Commission had accepted written comments.

**ORDER DENYING MOTION TO STAY AND REQUEST FOR
ADDITIONAL COMMENT CYCLE, GRANTING LEAVE TO
WITHDRAW AS COUNSEL, AND GRANTING MOTION
TO SUBMIT COMMENTS**

On January 12, 2001, WorldCom filed a motion requesting that the Commission stay this proceeding and establish time for an additional comment cycle. WorldCom argued that the decision in *Southwestern Bell Telephone Company v. Missouri Public Service Commission*, No. 99-3833 (8th Cir., filed Jan. 8, 2001), affected this case in such a way as to require additional time for comments. AT&T Communications of the Southwest, Inc. (AT&T), joined in WorldCom's request for additional comments regarding the court decision. On January 17, 2001, the Staff of the Missouri Public Service Commission (Staff), Gabriel Communications of Missouri, Inc. (Gabriel), and Sprint Communications Company, L.P. (Sprint), filed responses. Gabriel agreed with WorldCom that additional comments were necessary and suggested that additional briefs on the issue be taken after the final effective date of the *Southwestern Bell* decision on February 7, 2001. Sprint also concurred in the motion for additional comments regarding the court decision.

SWBT responded to WorldCom's motion on January 17, 2001. In its pleading SWBT stated that it was committed to offer the prices in the M2A for at least one year, regardless of the outcome of the *Southwestern Bell* case. SWBT argued that with this commitment there was no need for further delay because of the court decision.

On January 31, 2001, the Commission held an on-the-record conference where it presented its preliminary positions with regard to the M2A and SWBT's compliance with the 14-point competitive checklist. In response to WorldCom's

*Please see pages 73, 117, 150, 409, 429 and 432 for other orders in this case. In addition, see page 181, Volume 9 MPSC 3d, for another order in this case.

motion, the Commission received comments during the on-the-record conference regarding the *Southwestern Bell* decision. IP Communications of the Southwest (IP) also filed comments in response to WorldCom's motion on January 18, 2001. Having heard the comments of the parties regarding the impact of the decision, the Commission determines that no delay in this proceeding is necessary. In addition, because the Commission allowed comments to be filed and given on the record regarding the effects of the *Southwestern Bell* case, the Commission finds that it is not necessary to set a separate briefing schedule for receiving additional comments. Therefore, the Commission will deny WorldCom's request for a stay and motion to set a procedural schedule for receiving additional comments.

On January 22, 2001, a Motion for Leave to Withdraw as Counsel was filed by Linda K. Gardner pursuant to Commission rule 4 CSR 240-2.040(6). Ms. Gardner stated that Paul H. Gardner and Stephen D. Minnis had entered their appearances as counsel of record on behalf of Sprint, and that she was no longer acting as an attorney for Sprint in this case. There were no objections to Ms. Gardner's withdrawal, and the Regulatory Law Judge granted the withdrawal during the on-the-record conference on January 31, 2001. Therefore, the Commission will instruct its Records Department to remove Ms. Gardner as an attorney of record for this case.

On January 29, 2001, AT&T Communications of the Southwest, Inc., filed a motion requesting leave to submit supplemental comments "regarding a state commission's adoption of unbundled network element (UNE) rates that have been set for that ILEC in a neighboring state." No objections to AT&T's motion were received. The Commission determines that AT&T's motion should be granted and its attached comments are accepted.

IT IS THEREFORE ORDERED:

1. That the Emergency Motion to Stay the Proceeding and Establish Additional Comment Cycle filed by WorldCom on January 11, 2001, is denied.
2. That Linda K. Gardner is granted leave to withdraw as counsel of record in this case for Sprint Communications Company, L.P., and that the Record's Department of the Commission shall remove Ms. Gardner as an attorney of record.
3. That the Motion for Leave to Submit Supplemental Comment Regarding New FCC Statement on Adoption of Sister-State Pricing filed by AT&T Communications of the Southwest, Inc., on January 29, 2001, is granted.
4. That this order shall become effective on February 23, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur.
Dippell, Senior Regulatory Law Judge

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In the Matter of the Access Tariff Filing of IAMO Telephone Company

Case No. TT-2001-116
Decided February 13, 2001

Evidence, Practice and Procedure §8. The Commission made certain interim rates permanent in accordance with the parties' stipulation. The Commission found the stipulation reasonable and in the public interest. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing.

Evidence, Practice and Procedure §30. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing. The Commission reviewed the stipulation and agreement, found it reasonable and in the public interest, and approved it.

ORDER APPROVING STIPULATION AND AGREEMENT

On August 23, 2000, IAMO Telephone Company (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-509 and TO-99-254. The tariff bears an effective date of October 1, 2000. On August 31, 2000, the Commission rejected the tariff filing because it did not comply with the requirement in Case Nos. TO-99-509 and TO-99-254 that the Company file a general rate case.

On September 11, 2000, the Company filed a Motion for Reconsideration, or in the Alternative, Application for Rehearing. The Company represented that, contrary to the Commission's interpretation, its August 23, 2000, filing was intended to meet all the requirements of a general rate case filing. The Company also represented that it followed the general rate case procedure set forth in the Commission's rules. Based upon the representations in the motion for reconsideration, the Commission reconsidered and vacated its August 31, 2000, order and considered the filing in compliance with the Reports and Orders in Case Nos. TO-99-509 and TO-99-254. Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T) were granted intervention.

On January 5, 2001, the Company, Staff, the Office of the Public Counsel, and SWBT (the signatories) filed a nonunanimous stipulation and agreement (the stipulation). The only party not a signatory was AT&T. AT&T did not request a hearing pursuant to 4 CSR 240-2.115(3), and so, pursuant to 4 CSR 240-2.115(1), the Commission will treat the stipulation as unanimous.

In the stipulation, the signatories recommend that the revised tariff sheet filed by the Company on August 30, 2000, designed to make permanent certain interim rates, be permitted to become effective no later than February 28, 2001. The signatories also recommend that the Commission direct the Company to adopt the new depreciation rates that are attached to the stipulation. The signatories state

that the Company has no refund obligation pursuant to the terms of the interim tariff.

On January 18, 2001, Staff filed suggestions in support of the stipulation. Staff points out that the positions taken in its rebuttal testimony support the stipulation, and requests that the Commission approve it. No responses to Staff's suggestions were filed.

On February 1, 2001, the Staff filed a motion to admit all the prefiled testimony. Staff stated that none of the parties object to the granting of the motion. The Commission will admit the prefiled testimony into the record.

Pursuant to Section 536.060, RSMo 2000, the Commission may accept the stipulation and agreement as a resolution of the issues in this case. The Commission has reviewed the stipulation and agreement and finds it to be reasonable and in the public interest and will, therefore, approve it.

IT IS THEREFORE ORDERED:

1. That the Nonunanimous Stipulation and Agreement filed on January 5, 2001, is approved.
2. That the following tariff sheet filed August 23, 2000, by IAMO Telephone Company and assigned Tariff File No. 200100204, is hereby approved for service on or after February 28, 2001:
P.S.C. Mo. No. 2 Consolidated
5th Revised Sheet No. 4.1.1 canceling 4th Revised Sheet No. 4.1.1
3. That IAMO Telephone Company shall accrue depreciation expense beginning January 1, 2001, based on the depreciation rates attached to the stipulation and agreement filed on January 5, 2001.
4. That the prefiled direct testimony of William J. Warriner, the prefiled rebuttal testimony of William A. Meyer, Jr., Mark L. Oligschlaeger, Rosella L. Schad, and Philip K. Williams, and the prefiled surrebuttal testimony of Michael J. Pauls are admitted into the record.
5. That this order shall become effective on February 23, 2001.
6. That this case may be closed after February 24, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996.*

Case No. TO-99-227

Decided February 13, 2001

Telecommunications § 1. The Commission found that the Missouri 271 Interconnection Agreement (M2A) offered by Southwestern Bell Telephone Company did not meet the requirements of the "competitive checklist" as contained in Section 271(2)(B) of the Telecommunications Act of 1996.

Telecommunications § 1. The Commission determined that if Southwestern Bell Telephone Company modified its Missouri 271 Interconnection Agreement (M2A) as outlined in the interim order, no additional testing time would be required. Thus, the Commission found that under those circumstances it could find that the M2A met the requirements of Section 271(2)(B) of the Telecommunications Act of 1996 and it could make a conditional recommendation to the Federal Communications Commission regarding Southwestern Bell Telephone Company's intraLATA application.

INTERIM ORDER REGARDING
THE MISSOURI INTERCONNECTION AGREEMENT

On November 20, 1998, Southwestern Bell Telephone Company (SWBT) notified the Missouri Public Service Commission (Commission) of its intent to file with the Federal Communications Commission (FCC) its application for authority to provide interLATA telecommunications services in Missouri under Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the Act). Since that date, the Commission has held proceedings and received testimony and other evidence to determine if SWBT has complied with the requirements of the Act and, therefore, whether the Commission can give a positive recommendation to the FCC for SWBT's entry into the interLATA market.

After extensive hearings and comments, on June 28, 2000, SWBT filed a motion requesting that it be allowed to update the record. In addition, SWBT requested that the Commission approve a proposed Missouri interconnection agreement (M2A). Since the filing of the proposed M2A, the Commission has received additional evidence including comments and testimony from the parties, the report of an independent consultant, Ernst & Young, and two on-the-record Commission question and answer sessions. Also since the filing of the proposed M2A, SWBT

*Please see pages 69, 117, 150, 409, 429 and 432 for other orders in this case. In addition, see page 181, Volume 9 MPSC 3d, for another order in this case.

and the parties have had further negotiations and the M2A has undergone additional revisions. SWBT filed the latest amended version of the M2A along with its comments on November 20, 2000.

On January 31, 2001, the Commission held an on-the-record conference where it presented its first preliminary position with regard to the M2A and SWBT's compliance with the 14-point competitive checklist, received comments from the parties regarding the decision in *Southwestern Bell Telephone Company v. Missouri Public Service Commission*, No. 99-3833 (8th Cir. filed January 8, 2001), and asked questions of the parties regarding the Commission's preliminary position. The Commission will now set out its second preliminary position.

MISSOURI INTERCONNECTION AGREEMENT (M2A)

The M2A was modeled after an agreement that many of the same parties negotiated in the state of Texas. In addition to the general substantive terms of the Texas agreement, the M2A incorporates prices from the Commission's decisions in Case Nos. TO-97-40¹ and TO-98-115,² as well as additional modifications that have been agreed to during the course of this proceeding.

The Commission has considered the whole record before it and the M2A. The Commission finds that the M2A, if offered to the competitive local exchange carriers "as is," would not meet the requirements of the "competitive checklist" as contained in Section 271(2)(B) of the Act. The deficiencies of the M2A are outlined below.

AVAILABILITY OF THE M2A

The Commission is satisfied that if the M2A were to be modified as suggested in this interim order and made available to CLECs, the Commission would not require additional testing time before SWBT files its application with the FCC. The CLECs have not shown that additional testing time is necessary. The prices set out in the M2A, as modified by the recommendations in this position statement, will be the same prices, terms and conditions, under which Missouri CLECs have been operating for a substantial period of time through their regular interconnection agreements, or for a substantial period of time in one of Missouri's sister states in which SWBT is currently operating. In addition, the Commission will continue to monitor the performance of SWBT, and is confident that any substantial performance issues will be brought to the Commission's attention during the FCC's review. If during the FCC review, the Commission discovers a deterioration in the performance of SWBT, the Commission will supplement its recommendation to the FCC.

If SWBT should file a revised version of the M2A with the modifications as recommended in this preliminary position statement, after a reasonable time for review of the agreement, the Commission could find that SWBT has demonstrated

¹ *In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company.*

² *In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company.*

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compliance with the 14-point competitive checklist and make a conditional recommendation to the FCC for approval of SWBT's intraLATA application. However, the following changes would be required in the M2A.

CHECKLIST ITEM 1 - INTERCONNECTION

The specific problems with interconnection lie in the prices, terms and conditions offered for collocation. SWBT has recently filed a collocation tariff with the Commission in Case No. TT-2001-298; however, the prices, terms and conditions for collocation in the M2A have not yet been reviewed by the Commission to determine if they meet the appropriate FCC standards. Therefore, on the current record established, the Commission cannot find that SWBT has met this checklist item based on the prices set out in the current M2A.

The FCC has approved interim prices in Texas where that state commission had a schedule in place for setting permanent prices. In addition, the FCC has approved a Kansas agreement that is similar to the Texas agreement with the exception of a few modifications to the terms and conditions. Furthermore, during the Commission's on-the-record question and answer session on November 8, 2000, none of the parties indicated that they would object to Texas collocation prices with the terms and conditions of the Kansas agreement.

The CLECs and SWBT have been operating under the Texas prices for a substantial period of time. In order to move competition forward, the Commission finds that SWBT should offer interim prices identical to those in the Texas agreement that has been approved by the FCC. In addition, the Commission finds that SWBT should offer the same terms and conditions for collocation that were offered in the Kansas agreement.

These prices, terms and conditions should remain interim until such time as the Commission determines permanent prices, terms and conditions in its pending case, Case No. TT-2001-298. After the Commission's final decision in that case, a true-up of the interim prices with the permanent prices can occur.

CHECKLIST ITEM 2 - ACCESS TO NETWORK ELEMENTS

As part of the M2A, SWBT has offered prices for certain unbundled network elements (UNEs) that are consistent with the Commission's decision in Case No. TO-97-40. Staff has consistently stated that these prices conform to the standards required by the FCC. It has also been noted by Staff that the prices from Case No. TO-97-40 are a "bulk of the UNEs ordered by competitors" and have subsequently been incorporated into many of the Missouri approved interconnection agreements between SWBT and the CLECs. Therefore, the Commission determines that it is appropriate to continue to use these prices that have been utilized in Missouri since the final decision of the Commission in Case No. TO-97-40. The Commission finds that all the prices set in Case No. TO-97-40 should be adopted as the permanent prices in the M2A for those same UNEs.

Other prices for UNEs that are being utilized in Missouri are the prices from the Commission's December 23, 1997, Report and Order in Case No. TO-98-115.

Even though the recent court decision³ has created uncertainty as to the future of these prices, they are currently contained in the interconnection agreements between the CLECs and SWBT, and those parties have been operating under those prices in Missouri for a substantial period of time. Therefore, the Commission finds that it would be appropriate for SWBT to offer all the prices found in the Commission's December 23, 1997, Report and Order in Case No. TO-98-115, on an interim basis, subject to true-up.

Also contained in the M2A are prices for 95 unbundled network elements identified by Staff that have not been reviewed by the Commission for conformance with the FCC's standards. Based on the record currently before it, the Commission cannot find that SWBT has met this checklist item with regard to those 95 prices for UNEs. The FCC has approved interim prices in Texas for these 95 UNEs, and the CLECs and SWBT have been operating under the Texas agreement for a substantial period of time using those prices. The Commission finds that for those 95 UNEs, SWBT should offer the prices as stated in the Texas agreement, subject to true-up with permanent prices.

CHECKLIST ITEM 4 - UNBUNDLED LOCAL LOOPS

Loop conditioning costs for digital subscriber line (DSL) service is being examined in the Commission's Case No. TO-2000-322 in the context of an arbitration between SWBT and Covad. During this proceeding SWBT had committed to incorporating further loop conditioning prices into the M2A as determined by the Commission in Case No. TO-2000-322. However, SWBT and Covad reached a settlement in that case before the loop conditioning cost analysis was completed. Since those prices have not been determined by this Commission to comply with the FCC's standards, the Commission finds that it is more appropriate to use the Texas prices (which the FCC has determined are appropriate in the interim) as interim prices for loop conditioning, subject to true-up with the permanent prices to be set by the Commission.

The issues of line-splitting and line-sharing have also been a concern to the CLECs. The Texas Public Utilities Commission has addressed the issue of line-splitting through the process of an arbitration.⁴ The proceeding in Texas is not yet final pending appeal. Even so, the Oklahoma Commission made a condition of its positive recommendation for approval of SWBT's application for interLATA authority in that state (and the FCC subsequently approved SWBT's interLATA application for Oklahoma which included that condition) that the terms and conditions of the Texas line-splitting arbitration, once final, be made available for line-splitting in Oklahoma as an interim measure. The Commission determines that this is a reasonable approach. SWBT should make available in Missouri the prices, terms and conditions of the Texas line-splitting arbitration, once final, on an interim basis, subject to true-up, with permanent prices, terms and conditions to be set by the Commission.

³*Southwestern Bell Telephone Company v. Missouri Public Service Commission*, No. 99-3833 (8th Cir. filed January 8, 2001).

⁴See TPUC Docket No. 22315.

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Likewise, line-sharing in Missouri on an interim basis, subject to true-up, should be available on the same terms and conditions as it is in the Texas interim line-sharing appendix to the Texas agreement.

CHECKLIST ITEM 5 - UNBUNDLED LOCAL TRANSPORT

Staff has noted that not all unbundled local transport prices have undergone the scrutiny of the Commission to determine whether they meet the standards and requirements of the FCC. A portion of those prices are included in the above-referenced 95 UNEs. Therefore, for the same reasons as stated above, the Commission finds that Texas prices for those unbundled local transport prices not previously reviewed by the Commission should be adopted on an interim basis, subject to true-up.

DISCOUNT ON NONRECURRING CHARGES

In addition to the prices set out above, the Commission heard testimony regarding the method of setting nonrecurring charges (NRCs) in the state of Kansas. In that state, a 25 percent discount was taken on NRCs, but the NRCs were not reduced below the Texas prices. This adjustment was made to bring the Kansas NRCs in line with the Texas prices. The Commission finds that the Missouri NRCs need a similar adjustment. Therefore, SWBT should discount the prices for NRCs in Missouri as it did in the Kansas agreement. The NRCs should be reduced by 25 percent or to the Texas price, whichever is greater.

TRUE-UP

The Commission will proceed expeditiously with establishing new cases to determine permanent prices, terms and conditions for those interim prices in the M2A. When those permanent prices are set, the final true-up between the parties can begin. However, the Commission is concerned that, without some certainty of prices, the CLECs (and SWBT) will be unable to formulate a practical business plan. Therefore, the Commission finds that the true-up period for the interim prices in the M2A should be limited to six months, retrospectively from the effective date of a final Commission order setting each of the permanent prices.

DEPOSITS

The deposit language is found in Section 3.0 of the General terms and Conditions of the M2A. Some of the competitive local exchange carriers objected to the inclusion of this language, arguing that it was a barrier to entry into the market by new CLECs. This language was not included in the interconnection agreements that have been approved by the FCC for the states of Texas and Oklahoma. A slightly different deposit provision was included in the Kansas agreement. SWBT has not sufficiently demonstrated why this language would not be a barrier to entry for new CLECs, and therefore, the Commission determines that the language regarding deposits⁵ should be removed from the M2A.

⁵Section 3.0 of the M2A.

PERFORMANCE MONITORING

Version 1.7 of the Texas Performance Measurements has been incorporated into the M2A. There does not appear to be any disagreement among the parties that if the M2A is adopted, these are the appropriate performance measures to be included. The M2A also contains provisions for review of the performance measures on a six-month basis. However, there are still concerns with regard to the compliance of SWBT with Performance Measures 7.1,⁶ 10.1, 58, 59, and 73. In order to assure continued compliance with the performance measures, the Commission finds that SWBT should continue to abide by the performance measures as set out in the M2A.

SUMMARY

Therefore, the Commission will allow SWBT to file an amended M2A with the modifications as set out in this order. The Commission will direct its Staff to review the modified M2A and file a report with the Commission as to its compliance with the modifications directed in this interim order within one week of receiving the modified M2A.

If SWBT refiles its agreement with the modifications as set out in this order, after a reasonable time for review and consideration of that agreement, the Commission will issue a recommendation of approval conditioned upon SWBT's continued performance compliance. Upon approval of the proposed agreement, according to the terms, the agreement will become effective and therefore available to the CLECs. The Commission will also begin, in an expeditious manner, proceedings to determine permanent prices for those interim prices set out in the modified M2A.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone Company may file an amended version of its proposed interconnection agreement with the revisions as specified in this order.
2. That the Staff of the Missouri Public Service Commission shall review the modified M2A within one week of its filing and report to the Commission on its compliance with this order.
3. That this order shall become effective in February 23, 2001.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, CC., concur.
Murray, C., dissents, with dissenting opinion attached.

Dippell, Senior Regulatory Law Judge

⁶Comments from AT&T during the January 31, 2001, on-the-record conference indicated that there was a question with "return of reject notices and completion notices under 7.2 and 10.1." In Attachment 17 of the Performance Remedy Plan, it appears that AT&T was referring to Performance Measure 7.1.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I believe that this Commission could give a positive recommendation to the FCC for SWBT's entry into the InterLATA market based upon the extensive record and the latest version of the interconnection agreement (M2A), with only one revision. That revision would be interim rates for collocation.

Therefore, while I dissent from this interim order directing SWBT to file a further amended M2A, I intend to concur in any positive recommendation to the FCC.

In the Matter of Laclede Gas Company's Experimental Price Stabilization Fund.*

Case No. GO-2000-394
Decided February 13, 2001

Gas § 17.2. The Commission approved a one-year extension of the experimental Price Stabilization Plan, with certain modifications. The modifications included shortening the 90-day window or procurement period to 60 days, and increasing the amount of Laclede's contribution of its own funds to the Price Stabilization Plan from \$4 million to \$8 million.

**ORDER MODIFYING THE EXPERIMENTAL
PRICE STABILIZATION PROGRAM**

On December 22, 2000, the Staff of the Missouri Public Service Commission (Staff) filed a Staff Recommendation, urging that the Commission terminate the third year of the experimental Price Stabilization Program (PSP) of Laclede Gas Company (Laclede). Staff filed an additional pleading supporting its position on January 23, 2001.

Staff notes that the Commission established this case on January 11, 2000, to monitor Laclede's experimental PSP. Laclede's PSP was authorized by the Commission in its Report and Order in Case No. GO-98-484, issued June 15, 1999. The PSP was authorized for a term of three years, with the Commission retaining the "right, but not the obligation, to review the program annually and, if necessary, revise it to correct any major deficiencies on or before February 15 of each year of the program."

Staff argues that the PSP is flawed and recommends terminating the third year

*Please see pages 210 and 239 for other orders in this case.

of the PSP. Among other things, Staff states that the PSP permits the company to speculate at no risk for 90 days, while exposing its customers to the risk of losing an effective cap on natural gas prices. According to Staff, when the market moves against its customers, Laclede seeks Commission approval to take the steps needed to protect customers. Staff argues that this additional delay in a volatile market results in harm to Laclede's customers.

Staff further alleges that when the market price of natural gas retreats from the current record levels, Laclede will reap a windfall by operation of the market, not necessarily from action of its own. Staff states that customers lose protection in a rising market, and pay more for the delivered cost of gas through incentives in a declining market.

Laclede filed responses to Staff's position on January 5, 2001, and January 29, 2001. Laclede argues that there is no justification for terminating the third year of the PSP. Laclede alleges that for a revision to be made to the PSP, the Commission must first determine that the revision is necessary to correct a "major" deficiency. Laclede indicates that there is not any deficiency in the PSP that would warrant its elimination. Contrary to the Staff's assertion that the PSP "is no longer appropriate in current market conditions," Laclede asserts that the need for effective and workable price protection programs has never been greater.

Laclede contends that as a result of its efforts under the PSP, it has converted the \$4 million¹ in funds authorized under the PSP into a portfolio of financial instruments that have a realized value of \$11.5 million as of the last three business days of December. In addition, Laclede states that it has been able to achieve substantial reductions in the cost of obtaining price protection pursuant to the Overall Cost Reduction Incentive component of the program. Laclede indicates that to date, these cost reductions total more than \$17 million. Laclede alleges that as a result of its efforts under the PSP, the company has achieved approximately \$28.5 million in financial benefits.²

The Office of the Public Counsel (Public Counsel) filed a pleading supporting Staff's recommendation to terminate the third year of the PSP on January 29, 2001.

On January 30, 2001, the Commission issued an Order Setting Hearing, scheduling an on-the-record presentation for February 2, 2001. The Commission indicated that it required additional information regarding the alleged deficiencies of the PSP, and a more thorough explanation of the savings that have allegedly resulted from the program. At the hearing, the parties presented oral arguments on these topics. In addition, the Commission questioned counsel and witnesses for the parties.

On February 5, 2001, Staff submitted a proposed tariff incorporating its suggested modifications. On the same date, Public Counsel submitted a proposed tariff that includes the modifications supported by Public Counsel. On February 13, 2001, Laclede filed its Response to Proposed Modifications, noting that both

¹Under the PSP, the Maximum Recovery Amount (MRA) for the program is \$4 million annually, plus transactions costs.

²Staff and Public Counsel disagree with these calculations.

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proposals would effectively eliminate the PSP and replace it with a new set of rules to govern Laclede's hedging activities. Laclede alleges that these new rules would be counterproductive to any effective hedging activities and, in certain respects, completely unworkable. In addition, Laclede argues that such revisions are inconsistent with the terms of the company's tariff, which provides that the PSP may be "revised" to correct "major deficiencies" in the program. Laclede contends that the proposals eliminate, rather than revise, the program, and that neither proposal has been supported as necessary to correct a "major deficiency."

The Commission has reviewed the Staff Recommendation and the official case file, and considered the arguments and evidence presented at the hearing, and concludes that there is insufficient evidence to warrant terminating the third year of the PSP. However, the Commission notes that several modifications are appropriate. First, during the February 2, 2001, hearing, Laclede offered to shorten the 90-day window or procurement period to 60 days in order to alleviate some of the Commission's concerns. The Commission finds that shortening the window from 90 days to 60 days has the potential to benefit Laclede's ratepayers yet will not substantially hamper the workings of the PSP. Therefore, the Commission will direct Laclede to file a tariff revision implementing this change.

Second, during the hearing Laclede also offered to contribute for the third year of the PSP an additional \$4 million of its own funds to the \$4 million that is already authorized under the program. This modification will aid Laclede in obtaining future price protection for its customers. Therefore, the Commission accepts this offer and directs Laclede to file a revision to its tariff implementing this modification.

Third, the Commission encourages Laclede to work with the Staff and Public Counsel to implement the Reconciliation process found in the PSP on an expedited basis in order to provide Laclede's ratepayers with a financial benefit more quickly.

Fourth, during the hearing Laclede indicated that it plans to seek Commission approval to extend the PSP for a fourth year. The Commission is not taking a position as to whether the program should be extended. Nonetheless, in order to allow sufficient time to address this issue, the Commission will direct the parties to set a procedural schedule.

IT IS THEREFORE ORDERED:

1. That Staff's recommendation, filed December 22, 2000, to terminate the third year of Laclede Gas Company's Experimental Price Stabilization Program is denied.
2. That Laclede Gas Company is directed to file, no later than February 23, 2001, a tariff revision shortening the 90-day window to 60 days.
3. That Laclede Gas Company is directed to file, no later than February 23, 2001, a tariff revision implementing its offer to contribute, for the third year of the program, an additional \$4 million of its own funds to the \$4 million that is currently authorized.
4. That the Commission encourages the parties to work together to implement the Reconciliation process found in the experimental Price Stabilization Program on an expedited basis.
5. That the parties are directed to file, no later than March 7, 2001, a proposed procedural schedule to address whether the Experimental Price Stabilization Program should be continued for a fourth year.

6. That this order shall become effective on February 15, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur.

Ruth, Regulatory Law Judge

**In the Matter of the Petition of the North American Numbering
Plan Administrator, on Behalf of the Missouri Telecommuni-
cations Industry, for Approval of NPA Relief Plan for the 314
and 816 Area Codes.***

*Case No. TO-2000-374
Decided February 15, 2001*

Telecommunications §7. Pursuant to its general jurisdiction under Sections 386.250 and 392.520 of the Revised Statutes of Missouri and pursuant to delegations of authority from the Federal Communications Commission, the Missouri Public Service Commission has jurisdiction and authority to determine the method and implementation of numbering relief for the 314 and 816 area codes, to determine and implement certain numbering conservation methodologies, to review, audit and verify use of numbering resources, and to hear and determine certain requests or disputes related to the use or procurement of numbering resources.

Telecommunications §6. The Federal Communications Commission is vested with exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States pursuant to 47 U.S.C. Section 251(e).

Telecommunications §6. The Federal Communications Commission is vested with exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States pursuant to 47 U.S.C. Section 251(e). The Federal Communications Commission may delegate all or any portion of this authority to state commissions or other entities. *Id.*

Telecommunications §8. The Commission approves the Numbering Plan Area relief implementation plan for the 816 area code.

Telecommunications §26. The Commission approves the Numbering Plan Area relief implementation plan for the 314 area code.

**ORDER APPROVING THE 816 NPA RELIEF
IMPLEMENTATION PLAN AND DIRECTING FILING**

On October 24, 2000, the Commission issued its Report and Order (R&O) adopting an all services distributed overlay as the method of relief for the 816 Numbering Plan Area (NPA). The R&O established a technical and planning committee for the 816 NPA to develop an NPA relief implementation plan and schedule. The R&O required a consensus plan and schedule to be filed and allowed for the filing of responses to the plan and schedule.

*See pages 367 and 499, Volume 9, MPSC 3d for other orders in this case. In addition, see pages 237, 500, 503 and 549 for other orders in this case.

The North American Numbering Plan Administrator (NANPA) has assigned 975 to serve as the overlay area code for relief of the 816 NPA. On December 22, 2000, NANPA, acting through NeuStar, Inc., and acting for the 816 technical and planning committee, filed the relief implementation plan and schedule as required under the R&O. No responses to the proposed plan have been filed.

The proposed plan and schedule provides for:

- 1) A permissive dialing period that begins at 12:01 a.m. CT on October 20, 2001, and ends at 12:01 a.m. CT on February 16, 2002.
- 2) Mandatory dialing beginning at 12:01 a.m. CT on February 16, 2002.
- 3) Earliest effective date of Central Office (CO) code duplication in 975 NPA established as May 18, 2002.
- 4) A dialing plan requiring 10-digit local dialing within the 816 and 975 NPA.
- 5) A dialing plan requiring 1+ 10-digit dialing for toll calls within the 816 and 975 NPA.
- 6) Southwestern Bell Telephone Company to hold a test code for the industry to use to test equipment in the 975 NPA.
- 7) Establishment of a subcommittee to address technical implementation issues.
- 8) Establishment of a subcommittee to address customer education for implementing the NPA relief plan.

The Commission finds that the proposed relief implementation plan and schedule are acceptable and in the public interest and should be approved. The Commission notes that it specifically reserved authority in its R&O to substitute an NPA in the national rollout schedule for thousands-block number pooling. Should code utilization rates for the 816 and 975 NPA moderate or numbering resources be utilized more effectively as the result of number pooling or other optimization strategies, the Commission may consider on its own motion, or on the motion of a party, extending the implementation dates for the permissive and mandatory dialing periods.

Technical implementation issues that cannot be resolved by the technical implementation subcommittee for the 816 and 975 NPA may be brought to the Commission. The customer education subcommittee shall file a summary of the customer education plan with the Commission prior to its implementation and not later than July 9, 2001. The Commission will neither approve nor disapprove the plan; however, the Commission will hear any motions presenting objections or suggestions for the customer education plan and may order changes or supplements to the plan pursuant to objections or suggestions presented by motion or based upon the Commission's independent consideration of the plan.

IT IS THEREFORE ORDERED:

1. That the Commission approves the 816 and 975 NPA relief implementation plan and schedule as filed on December 22, 2000. The Commission reserves the option on its own motion, or on the motion of a party, to modify the plan as described in this order.
2. That technical implementation issues that cannot be resolved by the technical implementation subcommittee for the 816 and 975 NPA may be brought to the Commission.
3. That the customer education subcommittee shall file a summary of the customer education plan with the Commission prior to its implementation and not later than July 9, 2001. The Commission will neither approve nor disapprove the plan; however, the Commission will hear any motions presenting objections or suggestions for the customer education plan and may order changes or modifications to the plan pursuant to objections or suggestions presented by motion or based upon the Commission's independent consideration of the plan.
4. That this order shall become effective on February 25, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC.,
concur.

Thornburg, Regulatory Law Judge

**In the Matter of the Access Tariff Filing of KLM Telephone
Company.**

*Case No. TT-2001-120
Decided February 15, 2001*

Evidence, Practice & Procedure § 8. The Commission made certain interim rates permanent in accordance with the parties' stipulation. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing.

Evidence, Practice & Procedure § 30. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing. The Commission reviewed the stipulation and agreement, found it reasonable and in the public interest, and approved it.

ORDER APPROVING STIPULATION AND AGREEMENT

On August 23, 2000, KLM Telephone Company (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-511 and TO-99-254. The tariff bears an effective date of October 1, 2000. On August 31, 2000, the Commission rejected the tariff filing because it did not comply with the requirement in Case Nos. TO-99-511 and TO-99-254 that the Company file a general rate case.

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On September 11, 2000, the Company filed a Motion for Reconsideration, or in the Alternative, Application for Rehearing. The Company represented that, contrary to the Commission's interpretation, its August 23, 2000, filing was intended to meet all the requirements of a general rate case filing. The Company also represented that it followed the general rate case procedure set forth in the Commission's rules. Based upon the representations in the motion for reconsideration, the Commission reconsidered and vacated its August 31, 2000, order and considered the filing in compliance with the Reports and Orders in Case Nos. TO-99-511 and TO-99-254. Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T) were granted intervention.

On January 5, 2001, the Company, Staff, the Office of the Public Counsel, AT&T, and SWBT (the signatories) filed a unanimous stipulation and agreement (the stipulation). In the stipulation, the signatories recommend that the revised tariff sheet filed by the Company on August 23, 2000, designed to make permanent certain interim rates, be permitted to become effective no later than February 28, 2001. The signatories also recommend that the Commission direct the Company adopt the new depreciation rates that are attached to the stipulation. The signatories state that the Company has no refund obligation pursuant to the terms of the interim tariff.

On January 22, 2001, Staff filed suggestions in support of the stipulation. Staff points out that the positions taken in its rebuttal testimony support the stipulation, and requests that the Commission approve it. No responses to Staff's suggestions were filed.

Pursuant to Section 536.060, RSMo 2000, the Commission may accept the stipulation and agreement as a resolution of the issues in this case. The Commission has reviewed the stipulation and agreement and finds it to be reasonable and in the public interest and will, therefore, approve it.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on January 5, 2001, is approved.
2. That the following tariff sheet filed August 23, 2000, by KLM Telephone Company and assigned Tariff File No. 200100209, is hereby approved for service on or after February 28, 2001:

P.S.C. MO No. 1 Consolidated, Section 3

4th Revised Sheet No. 3.3.1 canceling 3rd Revised Sheet No. 3.3.1

3. That KLM Telephone Company shall accrue depreciation expense beginning January 1, 2001, based on the depreciation rates attached to the stipulation and agreement filed on January 5, 2001.

4. That this order shall become effective on February 25, 2001.
5. That this case may be closed after February 26, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

In the Matter of the Access Tariff Filing of Holway Telephone Company.

Case No. TT-2001-119
Decided February 15, 2001

Evidence, Practice & Procedure § 8. The Commission made certain interim rates permanent in accordance with the parties' stipulation. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing.

Evidence, Practice & Procedure §30. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing. The Commission reviewed the stipulation and agreement, found it reasonable and in the public interest, and approved it.

ORDER APPROVING STIPULATION AND AGREEMENT

On August 23, 2000, Holway Telephone Company (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-508 and TO-99-254. The tariff bears an effective date of October 1, 2000. On August 31, 2000, the Commission rejected the tariff filing because it did not comply with the requirement in Case Nos. TO-99-508 and TO-99-254 that the Company file a general rate case.

On September 11, 2000, the Company filed a Motion for Reconsideration, or in the Alternative, Application for Rehearing. The Company represented that, contrary to the Commission's interpretation, its August 23, 2000, filing was intended to meet all the requirements of a general rate case filing. The Company also represented that it followed the general rate case procedure set forth in the Commission's rules. Based upon the representations in the motion for reconsideration, the Commission reconsidered and vacated its August 31, 2000, order and considered the filing in compliance with the Reports and Orders in Case Nos. TO-99-508 and TO-99-254. Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T) were granted intervention.

On January 5, 2001, the Company, Staff, the Office of the Public Counsel, AT&T, and SWBT (the signatories) filed a unanimous stipulation and agreement (the stipulation). In the stipulation, the signatories recommend that the Company be authorized to file revised tariffs to: A) eliminate the existing touchtone charge; B) reduce residential local rates from \$16 to \$13 a month and reduce business local rates from \$25 to \$18 a month; C) implement new CLASS and custom calling services; D) reduce the originating intrastate carrier common line access rate from \$.052516 to \$.042516; and E) reduce the terminating intrastate carrier common line access rate from \$.088420 to \$.08198. The signatories also recommend that the Commission direct the Company adopt the new depreciation rates that are attached to the stipulation. The signatories state that the Company has no refund obligation pursuant to the terms of the interim tariff.

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On January 18, 2001, Staff filed suggestions in support of the stipulation. Staff points out that the positions taken in its rebuttal testimony support the stipulation, and requests that the Commission approve it. Staff states, at numbered paragraph 3:

The *Stipulation* provides that the revised tariff sheet, designed to make certain access rates permanent, should be permitted to become effective as soon as possible. . . .

However, the stipulation does not so provide. Accordingly, the Staff was directed to file revised suggestions explaining how this statement can be reconciled with the language in the stipulation, and explaining how the stipulation proposes that the tariff sheet be treated. On February 14, 2001, Staff filed revised suggestions in which it stated that the stipulation provides that in lieu of the interim tariff being allowed to become permanent, Holway be allowed to file revised permanent tariffs that will implement the changes discussed above.

Pursuant to Section 536.060, RSMo 2000, the Commission may accept the stipulation and agreement as a resolution of the issues in this case. The Commission has reviewed the stipulation and agreement and finds it to be reasonable and in the public interest and will, therefore, approve it.

IT IS THEREFORE ORDERED:

1. That the Nonunanimous Stipulation and Agreement filed on January 5, 2001, is approved.
2. That the following tariff sheet filed August 23, 2000, by Holway Telephone Company and assigned Tariff File No. 200100206, is rejected:
P.S.C. Mo. No. 1 Consolidated
5th Revised Sheet No. 4.1.1.1 canceling 4th Revised Sheet No. 4.1.1.1
for Maitland, Skidmore, Missouri
3. That Holway Telephone Company is authorized to file revised tariff sheets to implement the tariff changes listed in Paragraphs 1.A. through 1.E. of the Nonunanimous Stipulation and Agreement filed on January 5, 2001.
4. That Holway Telephone Company shall accrue depreciation expense beginning January 1, 2001, based on the depreciation rates attached to the stipulation and agreement filed on January 5, 2001.
5. That this order shall become effective on February 25, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

In the Matter of the Access Tariff Filing of Peace Valley Telephone Company.

*Case No. TT-2001-118
Decided February 15, 2001*

Evidence, Practice and Procedure § 8. The Commission made certain interim rates permanent in accordance with the parties' stipulation. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing.

Evidence, Practice and Procedure § 30. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing. The Commission reviewed the stipulation and agreement, found it reasonable and in the public interest, and approved it.

ORDER APPROVING STIPULATION AND AGREEMENT

On August 23, 2000, Peace Valley Telephone Company (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-531 and TO-99-254. The tariff bears an effective date of October 1, 2000. On August 31, 2000, the Commission rejected the tariff filing because it did not comply with the requirement in Case Nos. TO-99-531 and TO-99-254 that the Company file a general rate case.

On September 11, 2000, the Company filed a Motion for Reconsideration, or in the Alternative, Application for Rehearing. The Company represented that, contrary to the Commission's interpretation, its August 23, 2000, filing was intended to meet all the requirements of a general rate case filing. The Company also represented that it followed the general rate case procedure set forth in the Commission's rules. Based upon the representations in the motion for reconsideration, the Commission reconsidered and vacated its August 31, 2000, order and considered the filing in compliance with the Reports and Orders in Case Nos. TO-99-531 and TO-99-254. Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T) were granted intervention.

On January 5, 2001, the Company, Staff, the Office of the Public Counsel, and AT&T (the signatories) filed a nonunanimous stipulation and agreement (the stipulation). The only party not a signatory was SWBT. SWBT did not request a hearing pursuant to 4 CSR 240-2.115(3), and, in fact withdrew from the case on January 16, 2001. Pursuant to 4 CSR 240-2.115(1), the Commission will treat the stipulation as unanimous.

In the stipulation, the signatories recommend that the revised tariff sheet filed by the Company on August 30, 2000, designed to make permanent certain interim rates, be rejected, and that the Company instead be authorized to file revised permanent access rates for originating carrier common line service of \$0.053018 and for terminating carrier common line service of \$0.105212. The signatories also recommend that the Commission direct the Company to adopt the new deprecia-

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tion rates that are attached to the stipulation. The signatories state that the Company has no refund obligation pursuant to the terms of the interim tariff.

Although the stipulation provides that Staff will file suggestions in support of the stipulation, no such suggestions have been filed.

Pursuant to Section 536.060, RSMo 1994, the Commission may accept the stipulation and agreement as a resolution of the issues in this case. The Commission has reviewed the stipulation and agreement and finds it to be reasonable and in the public interest and will, therefore, approve it.

IT IS THEREFORE ORDERED:

1. That the Nonunanimous Stipulation and Agreement filed on January 5, 2001, is approved.
2. That the following tariff sheet filed August 23, 2000, by Peace Valley Telephone Company and assigned Tariff File No. 200100205, is rejected:
P.S.C. MO No. 1
6th Revised Sheet No. 13.1 canceling 5th Revised Sheet No. 13.1
3. That Peace Valley Telephone Company is authorized to file revised tariff sheets to establish permanent access rates for originating carrier common line service of \$0.053018 and for terminating carrier common line service of \$0.105212.
4. That Peace Valley Telephone Company shall accrue depreciation expense beginning January 1, 2001, based on the depreciation rates attached to the stipulation and agreement filed on January 5, 2001.
5. That this order shall become effective on February 25, 2001.
6. That this case may be closed after February 26, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

In the Matter of the Application of St. Louis County Water Company, doing business as Missouri-American Water Company, for Restatement and Clarification of Its Certificate of Convenience and Necessity for St. Louis County, Missouri.

Case No. WA-2001-288
Decided February 20, 2001

Certificates §21. The Commission granted a requested Certificate of Convenience and Necessity where the parties unanimously agreed to its issuance and the record showed that all statutory conditions were met.

**ORDER APPROVING STIPULATION AND AGREEMENT,
GRANTING CERTIFICATE OF CONVENIENCE AND
NECESSITY AND GRANTING CONTINUANCE**

Procedural History:

On October 31, 2001, St. Louis County Water Company, doing business as Missouri American Water Company (MAWC or Company), filed its application for restatement and clarification of its Certificate of Convenience and Necessity for St. Louis County, Missouri.

The Missouri Public Service Commission (the Commission) issued its Order Directing Notice on November 14, 2000. Therein, the Commission established an intervention period of 30 days, ending on December 14, 2000, and directed MAWC to serve its application on each affected municipality and to file proof of service in this case on or before November 24, 2000. MAWC filed proof of service on November 22, 2000.

Thereafter, the Cities of Winchester and Maryland Heights (Winchester) jointly moved for leave to intervene and moved for a hearing on December 12. The City of Chesterfield (Chesterfield) moved for leave to intervene on December 13. The City of St. Ann (St. Ann) applied to intervene on December 14. On December 15, the Cities and Villages of Ballwin, Bel Nor, Bel Ridge, Bella Villa, Bellerive, Bellefontaine Neighbors, Breckenridge Hills, Bridgeton, Clayton, Cool Valley, Crestwood, Des Peres, Green Park, Hazelwood, Manchester, Maplewood, Normandy, Pasadena Hills, Pine Lawn, Richmond Heights, Riverview, Rock Hill, Town and Country, University City, Velda City, and Wildwood (Cities and Villages) jointly filed their application to intervene out-of-time. On December 21, 2000, counsel for Company filed a copy of a letter that Company sent to each proposed intervenor herein. On January 11, 2001, the Commission granted intervention to all applicants, set a prehearing conference for January 25, 2001, and directed that a proposed procedural schedule be jointly developed and filed by February 1, 2001.

On January 25, 2001, the prehearing conference was held as scheduled. On February 1, 2001, the parties did not file a proposed procedural schedule. Rather, MAWC filed a Motion for Continuance, requesting that the due date for the proposed procedural schedule be reset to February 15. On the same day, the Staff of the Missouri Public Service Commission (Staff) filed its concurrence with MAWC's motion. However, before the Commission had an opportunity to take up and rule on MAWC's motion and Staff's concurrence, MAWC filed its Unanimous Stipulation and Partial Settlement and Continuance of Remaining Issues (Stipulation) on February 7, 2001. The Stipulation is attached hereto as Attachment 1 and incorporated by reference herein.¹

¹The Stipulation includes, as Exhibit A, the franchise granted to MAWC by the City of Valley Park in November 2000. Exhibit A is not attached to this order.

Discussion:

This case arises out of MAWC's proposed acquisition of the water distribution assets of the City of Valley Park (Valley Park) in St. Louis County, Missouri, and MAWC's corresponding need for legal authority to operate that system.

In its application, MAWC states that its predecessor in interest obtained in 1902 a perpetual franchise from the no-longer-existing County Court of St. Louis County, Missouri, to provide public water service in the county. In the six existing incorporated cities of the county, Kirkwood, Webster Groves, Ferguson, Bridgeton, Pacific, and Florissant, a municipal franchise was also required. Likewise, a municipal franchise was also required in any subsequently incorporated city except to the extent that MAWC's predecessor served the residents of that city prior to its incorporation. With the creation of this Commission in 1913, a certificate of convenience and necessity from the Commission was also required for MAWC's predecessor to expand its services.

Valley Park was incorporated in 1917, subsequent to the County Court franchise granted in 1902. At that time, MAWC's predecessor did not serve any customers in Valley Park. In 1982, MAWC's predecessor sought and obtained limited authority which authorized it to serve a single housing development in Valley Park. Case No. WA-82-141. Since 1982, Valley Park has annexed certain unincorporated sections of the county served by MAWC. Today, MAWC provides all of the water used by the residents of Valley Park and directly serves some of those residents. However, MAWC believes that it needs a certificate of convenience and necessity in order to operate the water distribution system previously belonging to the City of Valley Park and, thereby, to serve the whole of that city. It is noted that Valley Park granted the requisite municipal franchise to MAWC on November 20, 2000.

The Valley Park acquisition is not the only issue in this case. MAWC explains, in its application, that "[i]n discussions between the Company and the Commission Staff over the years, it has often been suggested that the Company should seek to restate and clarify its grandfather authority." The benefits of this undertaking are identified as "permit[ting] the Applicant's authority to be represented in the Commission's records in a manner that is traditional for other utilities within the state" and "eliminat[ing] administrative confusion and uncertainty with respect to the interpretation of the perpetual County Court franchise[.]" Additionally, it would eliminate "the pragmatic necessity for piecemeal applications[.]" It is this aspect of the application that has resulted in the intervention herein of numerous St. Louis County municipalities.

In the Unanimous Stipulation and Partial Settlement and Continuance of Remaining Issues filed on February 7, 2001, the parties seek to bifurcate this matter. They propose that the Commission grant the necessary certificate of public convenience and necessity to MAWC so that the acquisition of the Valley Park distribution system may be consummated. They further propose that the due date for the proposed procedural schedule be set off for 90 days so that they may attempt to resolve the remaining issues by negotiation.

Certificate of Convenience and Necessity:

Section 393.170, RSMo 2000, subsections 2 and 3, authorizes the Commission “to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary and convenient for the public service.”

Commission Rule 4 CSR 240 2.060(4) concerns applications for a certificate of convenience and necessity:

(4) In addition to the requirements of section (1), applications for a certificate of convenience and necessity by a gas, electric, water, sewer or heating company shall include the following information:

(A) If the application is for a service area:

1. A statement as to the same or similar utility service, regulated and nonregulated, available in the area requested;

2. If there are ten (10) or more residents or landowners, the name and address of no fewer than ten (10) persons residing in the proposed service area or of no fewer than ten (10) landowners in the event there are no residences in the area, or, if there are fewer than ten (10) residents or landowners, the name and address of all residents and landowners;

3. The legal description of the area to be certificated;

4. A plat drawn to a scale of one half inch (½”) to the mile on maps comparable to county highway maps issued by the Missouri Department of Transportation or a plat drawn to a scale of two thousand feet (2,000’) to the inch; and

5. A feasibility study containing plans and specifications for the utility system and estimated cost of the construction of the utility system during the first three (3) years of construction; plans for financing; proposed rates and charges and an estimate of the number of customers, revenues and expenses during the first three (3) years of operations;

* * *

(C) When no evidence of approval of the affected governmental bodies is necessary, a statement to that effect.

(D) When approval of the affected governmental bodies is required, evidence must be provided as follows:

1. When consent or franchise by a city or county is required, approval shall be shown by a certified copy of the document granting the consent or franchise, or an affidavit of the applicant that consent has been acquired; and

2. A certified copy of the required approval of other governmental agencies; and

(E) The facts showing that the granting of the application is required by the public convenience and necessity.

MAWC's application contains all of the information required by Commission Rule 4 CSR 2402.060, (1) and (4). The parties hereto have unanimously stipulated and agreed that the Commission should issue a certificate of convenience and necessity to MAWC such that it is authorized to operate the water distribution assets belonging to the City of Valley Park and to serve such residents of that city as it does not already serve. Since all of the parties agree that the requested certificate be granted and since there are no requests for a hearing, the Commission determines that no hearing is necessary. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

The application states, and the Commission finds, that St. Louis County Water Company lawfully does business as Missouri-American Water Company and is a water corporation, subject to the jurisdiction of this Commission. The Commission further finds that MAWC presently serves some 300,000 customers in St. Louis County and a portion of Jefferson County pursuant to authorization by this Commission and various other governmental bodies. MAWC is the largest water utility in St. Louis County. MAWC proposes to provide water service in Valley Park under the same rates and conditions as its existing customers.

Based on the foregoing, the Commission concludes that the Stipulation and Agreement should be approved and the requested certificate of convenience and necessity granted. MAWC already provides all water to Valley Park and directly serves some of its residents. The Commission concludes that it is both convenient and necessary that it serve the remainder as well.

Motion for Continuance:

The Commission agrees that the parties should have an opportunity to resolve the remaining issues short of litigation. Therefore, the motion for continuance, which is unopposed, shall be granted.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed by the parties on February 7, 2001, is approved.

2. That St. Louis County Water Company, doing business as Missouri-American Water Company, is granted a certificate of public convenience and necessity to own, operate,

control, manage, and maintain public drinking water facilities and to render drinking water service to the public within the City of Valley Park, Missouri, located in St. Louis County, Missouri.

- 3. That the parties' motion for a continuance is granted.
- 4. That the parties shall file a proposed procedural schedule, as previously directed herein, on or before May 31, 2001.
- 5. That this order shall become effective on March 2, 2001.

Lumpe, Ch., Drainer, Murray, and Simmons, CC., concur.
Schemenauer, C., absent.

Thompson, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

In the Matter of an Investigation into Water Quality for Missouri-American Water Company's St. Joseph District.

Case No. WO-2001-71
Decided February 20, 2001

Service §18. Water §19. The Commission closed a case established to investigate water quality in one of Company's seven, non-contiguous districts, where the record showed that water quality was affected only with respect to certain esthetic factors, that Company had taken reasonable steps to ameliorate these conditions, and that no party sought a hearing.

ORDER CLOSING CASE

Procedural History:

On July 7, 2000, the Office of the Public Counsel (Public Counsel) moved this Commission to establish a docket for the purpose of an investigation into the quality of water provided to customers in the St. Joseph operating district of Missouri American Water Company (MAWC). Public Counsel acted in response to water quality complaints offered by members of the public at a local public hearing held in St. Joseph on May 31, 2000, in Case No. WR-2000-281. MAWC responded on July 17, 2000, stating that it "would like to take the opportunity to directly address in a separate docket the concerns and misconceptions that have developed since the new St. Joseph treatment plant was brought on line."

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On July 18, the Commission directed the Staff of the Missouri Public Service Commission (Staff) to respond to Public Counsel's motion. Staff filed its response on August 2, 2000, stating that the investigation proposed by Public Counsel "would be useful." Therefore, on August 15, 2000, the Commission established this case for the purpose of receiving and evaluating the results of an investigation into the quality of the water supply in MAWC's St. Joseph operating district, including such items as hardness, odor and taste.

The Commission made MAWC a party to this case and reminded the parties that, in Case No. WO-98-203, MAWC conducted an investigation into the hardness, odor, and taste of the water supply in its Warrensburg operating district and filed a report with the Commission. The Commission directed MAWC to conduct a similar investigation in St. Joseph and to file a similar report by the 90th day. The Commission also directed that notice of this proceeding be given to appropriate persons. The Commission notes that no applications to intervene were received.

On November 22, 2000, MAWC filed its report as directed. The Commission, on November 28, 2000, directed Staff to respond to MAWC's report within 60 days and to include in its response a recommendation as to what additional action, if any, the Commission should take in this case. Staff filed its response on January 29, 2001. Therein, Staff recommended that no further action is necessary and that this case should be closed.

Discussion:

During MAWC's latest rate case, Case No. WR-2000-281, Public Counsel received complaints concerning the quality of water provided by MAWC in its St. Joseph, Missouri, service area. Consequently, Public Counsel moved for the establishment of this docket to investigate these water quality issues. As a first step, MAWC was directed to produce a report on water quality issues in the St. Joseph service area, including such areas of concern as hardness, taste and odor.

MAWC's report was filed on November 22, 2000. It consists of several hundred pages organized in some 17 sections. MAWC's position is that the water in question is safe, that the customer complaints arose from a change from a river water source to a ground water source, and that MAWC has addressed, and continues to address, these customer concerns by making adjustments to its processing of water.

MAWC summarized the customer complaints received by the Public Counsel, noting that they initially addressed taste and odor and then shifted to hardness. MAWC notes that, on April 3, 2000, it began delivering water from its new water treatment plant and water sources in St. Joseph. The shift of water source from river water to ground water (wells) resulted in corresponding changes in mineral content, perceived by customers as a change in taste, odor and hardness. MAWC stated that ground water is typically "harder" than river water because of a higher level of dissolved calcium and magnesium. These dissolved minerals will precipitate, MAWC states, when the water is frozen to make ice or is heated in cooking or is used to make hot beverages. Particulate matter becomes visible in the ice cubes and an oily film becomes apparent on the surface of hot beverages.

The latter phenomenon is exacerbated by the oils naturally present in tea and coffee. MAWC noted that its delivered water in St. Joseph has always complied with drinking water standards promulgated by the United States Environmental Protection Agency (EPA) and the Missouri Department of Natural Resources (DNR). MAWC further stated that it has continued to refine its processing in order to address customer complaints.

To resolve hardness complaints, MAWC states that it has added a blended polyphosphate and caustic soda to its water, the first to bind the dissolved minerals and reduce the symptoms noted by consumers, the second to cause the dissolved minerals to precipitate out of the water altogether. MAWC asserts that these steps have been successful in reducing consumer complaints. MAWC's goal has been to produce water that is no "harder" than the water produced from the river source prior to April 2000. MAWC states that it has achieved this goal.

MAWC also addressed taste and odor concerns voiced by customers. MAWC states that taste and odor issues arise from the use of chlorine as a disinfectant in processing the water. To address these concerns, MAWC switched to the use of chloramines. This step solved the taste and odor issues, but poses a concern for persons with aquariums and for facilities performing kidney dialysis. The former must add a dechlorinating agent to their aquariums to remove the persistent chloramines. The latter must employ an additional filter to accomplish the same goal. MAWC states that all customers in its St. Joseph service area were notified by mail a month prior to the switchover. MAWC notes that taste and odor complaints dropped noticeably after the switchover to chloramination on April 24, 2000.

Staff filed its response to MAWC's report on January 29, 2001. Staff states that it has verified that MAWC's St. Joseph plant is in compliance with EPA and DNR regulations. Staff states that MAWC's report has "adequately" addressed the water quality concerns raised by the Public Counsel. Staff states that it collected water on at least two occasions in St. Joseph and noted that the hardness concerns had indeed moderated perceptibly. Contacts with complaining consumers showed that many believed the water had improved, while some continued to complain. Staff and MAWC agree that the hardness of the water varies from day to day, dependent upon conditions in the nearby Missouri River. Staff states, in conclusion, that the drinking water in St. Joseph is safe and that MAWC has appropriately and adequately addressed the aesthetic concerns raised by some customers. Staff states that further Commission action is unnecessary and recommends that the case be closed.

The Commission has reviewed MAWC's report and Staff's response. Public Counsel has not responded either to MAWC's report or Staff's response to that report; the time for doing so has now passed. No requests for intervention have been received and no party has requested a hearing. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989). Based on the information before it, the Commission concludes that MAWC has appropriately addressed customer complaints regarding water quality in its St. Joseph service area and that further action by the Commission is unnecessary.

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IT IS THEREFORE ORDERED:

1. That this case may be closed.
2. That this order shall become effective on March 2, 2001.

Lumpe, Ch., Drainer, Murray, and Simmons, CC., concur.
Schemenauer, C., absent.

Thompson, Deputy Chief Regulatory Law Judge

**In the Matter of Missouri Gas Energy’s Purchased Gas Adjust-
ment Tariff Revisions to be Reviewed in Its 2000-2001 Actual
Cost Adjustment.***

*Case No. GR-2001-382
Decided February 20, 2001*

Gas §17.1. The Commission permitted Company to seek an unscheduled rate adjustment and granted an interim rate increase to reflect the unexpected and severe natural gas price spike because Company was required to pay significantly greater prices in order to obtain gas.

ORDER GRANTING WAIVER AND APPROVING INTERIM RATES

Missouri Gas Energy, a Division of Southern Union Company (MGE), of Kansas City, Missouri, submitted a tariff sheet to the Commission on February 13, 2001, carrying an effective date of March 1, 2001. Accompanying the tariff sheet was a motion for waiver to permit MGE to make a second unscheduled winter Purchased Gas Adjustment (PGA) filing.

The proposed tariff sheet was filed to reflect unscheduled changes in MGE’s PGA factors as the result of a reduction in the previous high prices of natural gas. MGE states that the first-of-the-month index price has declined from approximately \$10.00 per MMBtu, an all time high, in January 2001 to \$6.30 per MMBtu in February 2001. MGE proposes to adjust the Current Cost of Gas (C.C.G.) factor in order to pass along the benefit of lower natural gas market prices to its customers. The net effect of this change will decrease the firm PGA factor for the remainder of the 2000 2001 winter season to \$0.79337 per Ccf from the current firm PGA factor of \$0.98161 per Ccf.¹

The Staff of the Commission (Staff) filed a memorandum and recommendation on February 15, 2001, recommending that the Commission grant the requested waiver and approve the proposed tariff sheet. Staff states that approval of this

*See page 541, Volume 9 MPSC 3d for another order in this case.
¹ The winter heating season extends from November through March.

proposed tariff sheet will result in a reduction of the gas costs paid by MGE's customers for home heating and other domestic uses and that the actual impact of the tariff will vary with the weather. Staff states that the proposed changes in MGE's PGA were calculated in conformance with the Company's approved PGA Clause, and that MGE's tariff permits the filing of proposed PGA tariffs on ten days' notice. Staff also states that MGE has shown good cause such that the requested waiver should be granted and the proposed tariff sheet approved.

Staff recommends that the Commission approve the tariff sheets to become effective March 1, 2001, on an interim basis, subject to refund, pending a final Commission decision in MGE's pending ACA cases, Case Nos. GR-2000-425, GR-99-304, GR-98-167, and GR-96-450.

The Commission has reviewed the proposed tariff sheet and Staff's recommendation and memorandum, and finds that the tariff sheet conforms to MGE's Commission-approved PGA Clause and is therefore reasonable. After considering Staff's recommendation, and for good cause shown pursuant to Section 393.140(11), RSMo 2000, the Commission finds that the requested waiver should be granted and the proposed tariff sheet should be approved for service rendered on and after the requested effective date of March 1, 2001, on an interim basis, subject to refund.

IT IS THEREFORE ORDERED:

1. That the waiver requested on February 13, 2001, by Missouri Gas Energy, a Division of Southern Union Company, of Kansas City, Missouri, is granted.
2. That the tariff sheet submitted on February 13, 2001, by Missouri Gas Energy, a Division of Southern Union Company, of Kansas City, Missouri, is approved on an interim basis, subject to refund, to become effective on March 1, 2001. The tariff sheet approved is:

P.S.C. Mo. No. 1

3rd Revised SHEET No. 24.32, Canceling 2nd Revised SHEET No. 24.32

3. That this order shall become effective on March 1, 2001.

Lumpe, Ch., Drainer, Murray, and Simmons, CC., concur.
Schemenauer, C., absent.

In the Matter of Laclede Gas Company's Purchased Gas Adjustment Tariff Revisions to be Reviewed in Its 2000-2001 Actual Cost Adjustment.*

*Case No. GR-2001-387
Decided February 20, 2001*

*See page 554, Volume 9 MPSC 3d for another order in this case.

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Gas §17.1. The Commission approved a gas company's request for a waiver from the terms of its tariff to permit it to make a second unscheduled winter purchased gas adjustment in order to reduce its retail gas rates.

**ORDER GRANTING MOTION FOR WAIVER AND
APPROVING INTERIM RATES**

Laclede Gas Company (Laclede) submitted a tariff sheet to the Commission on February 14, 2001, carrying an effective date of March 1, 2001. The proposed tariff sheet was filed to reflect unscheduled changes in Laclede's Purchased Gas Adjustment (PGA) factors as the result of falling wholesale prices of natural gas since Laclede made its first unscheduled winter PGA filing on January 12, 2001. The net effect of the changes proposed by Laclede will decrease the firm PGA factor for the remainder of the 2000-2001 winter season to \$0.75311 per therm from the current firm PGA factor of \$0.91311 per therm.

Laclede's PGA tariff provides that Laclede is permitted to make only one unscheduled PGA filing during the winter period. Laclede made that filing on January 12, 2001 when it sought authority to increase its rates. In order to make this second PGA filing to reduce its rates, Laclede filed a Motion for Waiver to Make a Second Unscheduled Winter Purchased Gas Adjustment Filing. In that motion, Laclede also sought authority to flow through to its customers on an expedited basis certain financial benefits achieved by Laclede as a result of the hedging program previously approved by the Commission.

The Staff of the Commission (Staff) filed a memorandum and recommendation on February 15, 2001, stating that the changes in Laclede's PGA were calculated in conformance with the Company's approved PGA Clause, and that Laclede's tariff permits the filing of proposed PGA tariffs on ten days' notice. Staff also recommends that the Commission grant Laclede's Motion for Waiver to Make a Second Unscheduled Winter Purchased Gas Adjustment Filing. Staff recommends that the Commission approve the tariff sheet to become effective March 1, 2001, on an interim basis, subject to refund.

The Commission has reviewed the proposed tariff sheet and Staff's recommendation and memorandum, and finds that the tariff sheet conforms to Laclede's Commission-approved PGA Clause and is therefore reasonable. While the tariff carries an effective date of March 1, the cover letter from Laclede that accompanied the tariff indicates that "in light of the large increases in gas bills that has (sic) occurred this winter season as a result of both extraordinarily high wellhead natural gas prices and colder than normal weather, the Commission may wish to approve an earlier effective date to expedite the rate relief provided by this filing." Laclede's letter further indicates that it is prepared to implement the rate decrease at an earlier date so long as the Commission provides at least two days' notice to accommodate Laclede's internal billing procedures. Missouri statutes, specifically Section 393.140(11), RSMo 2000, permit the Commission to approve a tariff on less than thirty days' notice for good cause shown. Expediting rate relief to Laclede's customers is certainly good cause. Therefore, the Commission will approve Laclede's proposed tariff for service rendered on and after February 23, 2001, on an interim basis, subject to refund.

IT IS THEREFORE ORDERED:

- 1. That Laclede Gas Company's Motion for Waiver to Make a Second Unscheduled Winter Purchased Gas Adjustment Filing is granted.
- 2. That the tariff sheet submitted on February 14, 2001, by Laclede Gas Company, is approved on an interim basis, subject to refund, to become effective on February 23, 2001. The tariff sheet approved is:

P.S.C. Mo. No. 5 Consolidated
One Hundred and Eighty-Fourth Revised Sheet No. 29, CANCELING One
Hundred and Eighty-Third Revised Sheet No. 29

- 3. That this order shall become effective on February 23, 2001.

Lumpe, Ch., Drainer, Murray, and Simmons, CC., concur
Schemenauer, C., absent

Woodruff, Senior Regulatory Law Judge

**In the Matter of Missouri Gas Energy's Application for Variance
from Sheet Nos. 24.18 and 61.4 to Permit the Use of Certain
Federal Refunds and Unauthorized Use Charge Collections
for the Benefit of Low-Income Customers in the Company's
Service Area.**

Case No. GE-2001-393
Decided March 6, 2001

Gas §1. The Commission denied the company's request for a variance from its approved tariff sheets regarding the treatment within the Purchased Gas Adjustment of certain federal refunds and unauthorized use charge collections. Instead of refunding the money to the customers as provided for by the company's tariff, the company sought to assign these moneys to a specified charity to assist low-income customers in the company's service territory who were having difficulty paying their gas bills. The Commission found that Missouri law prohibited the Commission from approving the requested variance.

Gas §7. The company requested a variance from its tariff so that it could assign certain federal refund and unauthorized use charge collections to a specified charity instead of refunding the money to the customers as provided for by the company's tariff. The Commission found that the requested variance was prohibited by Missouri law.

Gas §17.1. The Commission denied the company's request for a variance from its approved tariff sheets regarding the treatment within the Purchased Gas Adjustment of certain federal refunds and unauthorized use charge collections. Instead of refunding the money to the customers as provided for by the company's tariff, the company sought to assign these moneys to a specified charity to assist low-income customers in the company's service territory who were having difficulty paying their gas bills. The Commission found that Missouri law prohibited the Commission from approving the requested variance.

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APPEARANCES

Robert J. Hack, Senior Attorney, Missouri Gas Energy, 3420 Broadway, Kansas City, Missouri 64111, for Missouri Gas Energy, a division of Southern Union Company.

Stuart W. Conrad, Finnegan, Conrad & Peterson, 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri 64111, for Midwest Gas Users' Association.

David R. Hill, Blackwell, Sanders, Peper, Martin, 2300 Main Street, Suite 1000, Kansas City, Missouri 64108, for Mid America Assistance Coalition, Inc.

Douglas E. Micheel, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Thomas R. Schwarz, Jr., Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Vicky Ruth

REPORT AND ORDER**Procedural History**

On January 18, 2001, Missouri Gas Energy (MGE), a division of Southern Union Company, filed an Application for Variance and Motion for Expedited Treatment. MGE requested that the Commission grant, as expeditiously as possible, a variance to Sheet Nos. 24.18 and 61.4 of its approved tariff regarding the treatment within the Purchased Gas Adjustment (PGA) of certain federal refunds and unauthorized use charge collections. MGE seeks instead to assign these moneys to the Mid America Assistance Coalition, Inc. (MAAC), to assist low income customers in MGE's service territory who are having difficulty paying their gas bills.

On January 22, 2001, the Commission issued a Notice and Order Directing Filing, directing all interested persons to file an application to intervene no later than January 26, 2001. The order also provided that responses to MGE's application for variance were to be filed no later than January 29, 2001.

On January 25, 2001, Midwest Gas Users' Association (Midwest) filed an application requesting intervention and providing its statement of position. Midwest's application to intervene was granted February 1, 2001.

The Staff of the Missouri Public Service Commission (Staff) filed Suggestions in Opposition to Application for Waiver on January 29, 2001. On the same date, the Office of the Public Counsel (Public Counsel) filed its response opposing the application for variance.

MGE filed a response to Midwest's statement of position and to the responses of Staff and Public Council on January 30, 2001.

On February 2, 2001, MGE filed a response to the Commission's February 1, 2001, agenda session discussion regarding this matter.

On February 5, 2001, Midwest filed a response to MGE's February 2, 2001, pleading.

MAAC filed a motion for leave to intervene out of time and statement of position on February 6, 2001. The Commission granted MAAC's request to intervene by order issued February 8, 2001.

On February 8, 2001, the Commission issued an order scheduling a hearing for February 15, 2001. The Commission specifically directed the parties to provide any evidence that is necessary for the Commission to make its determination, and to present arguments as to whether the Commission has the legal authority to grant the application for variance.

All parties appeared for the hearing on February 15, 2001. The Commission directed the parties to file briefs on or before February 21, 2001, at 4:00 p.m. By order issued February 16, 2001, the Commission directed that the briefs be filed no later than 12:00 p.m. on February 21, 2001. On February 21, 2001, MGE, Staff, Public Counsel and MAAC filed their briefs.

Discussion

MGE requests a variance from provisions of its tariff contained in Sheets 24.18 and 61.4. Sheet 24.18 provides, among other things, that unless otherwise ordered by the Commission, refunds in excess of \$75,000 received by MGE from charges paid and recovered through the PGA applicable to Residential, Small General, Large General and Unmetered Gaslight customers, shall be refunded to such customers as a reduction in PGA rates. MGE anticipates collecting from Williams Gas Pipelines Central (Williams) a refund of approximately \$620,000 by order of the Federal Energy Regulatory Commission (FERC). This refund represents a compromise of competing claims regarding Williams' conduct of certain storage-related matters following a 1989 FERC order. Costs for storage service on the Williams system are included in MGE's PGA.

Tariff Sheet 61.4 provides that revenues received from unauthorized use charges recovered pursuant to Sheet 61.3 of MGE's tariff will be considered gas cost recovery, and used as such in the development of future gas cost recovery during the ACA process. MGE anticipates collecting approximately \$356,715 in unauthorized use charges from its transportation customers pursuant to bills it issued in January 2001, for unauthorized usage by transportation customers in December 2000.

In its application, MGE indicated that if its application was approved, it would contribute \$250,000 of its own funds to MAAC. In fact, MGE noted during the hearing that it has already contributed the \$250,000 to MAAC.

MGE seeks a waiver of these provisions so that it may divert these specified refunds and unauthorized use charges from the customers entitled to the moneys pursuant to MGE's tariff. MGE indicates that although these funds total approximately \$976,715, returning these moneys to all customers through a reduction in PGA rates would have a *de minimis* impact on the prospective rate of all sales customers.¹ MGE proposes to transfer the specified funds to MAAC, a not-for-profit

¹ MGE indicates that if the request for waiver is denied, the moneys in question would result in a reduction in PGA cost of less than \$2.00, on average, per customer for the year.

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agency which specializes in coordinating and administering a variety of community-based social assistance programs.

MAAC supports the request for variance. MAAC points out that these are extraordinary times, and that the combination of record high natural gas prices and extreme cold this winter has increased the need for funds to assist the needy with their utility bills. MAAC argues that the Commission has broad discretion within the statutory scheme to safeguard the public interest, and is not statutorily prohibited from granting the variance.

Midwest indicates that it is taking no position regarding the Commission's legal authority or lack thereof to grant the requested variance. Nonetheless, Midwest does have concerns with the proposal regarding unauthorized transportation usage charges. Midwest wants to ensure that the Commission does not take a position which legitimizes otherwise improper unauthorized use charges. Midwest requests that if the Commission grants the variance, that it include in its order a statement to the effect that such approval does not affect the rights of any customer to dispute incorrect charges.

Staff argues that the Commission does not have the statutory authority to grant the requested waiver. In addition, Staff suggests that, in spite of the popularity of the cause, the Commission should not require ratepayers to fund utility contributions to charitable causes. Staff notes that the requested variance proposes to take funds from customers who are not eligible for other assistance with this winter's high gas bills, and who have had the opportunity to voluntarily make such transfers, and contribute those funds to a select few customers.

Public Counsel also opposes the request for variance, stating that it believes that the Commission lacks the statutory authority to grant the variance. In addition to the legal prohibition, Public Counsel argues that there are strong policy reasons for not granting the requested variance.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

MGE is a gas corporation and public utility engaged in the distribution of natural gas at retail to approximately 485,000 customers in the state of Missouri, subject to the jurisdiction of the Commission. MGE's principal place of business is located at 3420 Broadway, Kansas City, Missouri 64111.

It is undisputed that the weather this year has been extremely cold. This November-December period was the coldest in recorded history for Missouri. Likewise, natural gas prices this winter reached unprecedented high levels. It is undisputed that the extremely cold weather, combined with the record high price of natural gas, has resulted in record high gas bills. These record high gas bills have caused financial hardships for many of MGE's customers.

The funds which MGE proposes to divert come from two sources. The first source of funds is certain specified refunds. MGE anticipates receiving approximately \$620,000 in refunds from Williams Gas Pipelines Central by order of the FERC. This refund represents a compromise of competing claims regarding Williams' conduct of certain storage-related matters.

The second source of funds is unauthorized use charges received from MGE's transportation customers. MGE anticipates collecting approximately \$356,715 in unauthorized use charges from its transportation customers pursuant to bills it issued in January for unauthorized usage by transportation customers in December 2000. The funds from these two sources total approximately \$976,715.

MGE has contributed \$250,000 of shareholders' funds to MAAC for the purpose of assisting low income ratepayers in paying gas bills. MGE proposes to also provide the contested moneys to MAAC for the same purpose. MAAC is a not-for-profit corporation based in Kansas City, Missouri, which specializes in coordinating and administering a variety of social assistance programs, including providing financial assistance to low income persons for the payment of energy bills.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Missouri Public Service Commission has jurisdiction over MGE's services, activities, and rates pursuant to Section 386.250 and Chapter 393, RSMo.

This case revolves around two issues. First, does the Commission have the authority under the statutes to grant the requested variance? Second, if the Commission does have such authority, do policy considerations support granting the waiver?

Several statutes are applicable to the first question. Section 393.130.2, RSMo 2000, provides, in relevant part, that:

No gas corporation . . . shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas . . . or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

Section 393.140(11) provides, in pertinent part:

Unless the commission otherwise orders, no change shall be made in any rate or charge . . . or any rule or regulation relating to any rate, charge or service . . .

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which shall have been filed and published by a gas corporation . . . in compliance with an order or decision of the commission, except after thirty days' notice to the commission. . . . No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified . . . or any rule or regulation . . . except such as are regularly and uniformly extended to all persons and corporations under like circumstances. . . .

Read individually or together, these two sections prohibit the requested variance. Section 393.130.2 forbids MGE from directly or indirectly rebating to customers any part of collected rates when such a rebate results in a lesser compensation by one person for the same service than is paid by another person for a like and contemporaneous service under the same or substantially similar circumstances. MGE's proposal seeks to give a certain group of residential customers an indirect rebate by transferring the funds at issue to MAAC.

MGE's proposed variance is also prohibited by Section 393.140(11). This section prohibits a refund to fewer than all utility customers who are similarly situated. MGE's proposal would provide refunds to only a subgroup (low income customers) of the Residential class, which clearly violates the plain meaning of the statute. In fact, MGE's proposal creates a subgroup (low income customers receiving funds from MAAC) within a subgroup (low income customers) of the Residential class. Thus, MGE's proposal does not even treat all members of the subgroup of low income customers in a like manner.

Although the Commission does have considerable discretionary authority in setting rates pursuant to Section 393.140, this discretion is limited by the applicable statutes. Where, as here, a procedure before the Commission is prescribed by statute, the statute must be followed. *State ex rel. Monsanto Company v. Public Service Commission*, 716 S.W.2d 791, 796 (Mo. banc 1996). The General Assembly has clearly set out, in Sections 393.130.2 and 393.140(11), the Commission's authority to grant refunds and the procedure the Commission must use, stating that those refunds are only lawful when regularly and uniformly extended to all customers under like circumstances. Although MGE and MAAC point to general provisions in Section 393.140(11) to support the position that the Commission has the discretionary authority to grant the variance, this general statutory provision does not alter the explicit provisions contained in Sections 393.140(11) and 393.130 regarding the treatment of rebates and refunds.

Granting the requested variance would also result in undue and unreasonable discrimination contrary to Section 393.130.3, which provides that:

No gas corporation . . . shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Approving this variance would result in intraclass rate level differences, creating a new class of customers: the disadvantaged or low income customer class. To date, the Commission has not created a disadvantaged or low income customer class.² Furthermore, the proper venue to discuss the appropriateness of creating a new customer class is not a variance case.

In *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 S.W.2d 37, 44 45 (Mo. 1931), the Missouri Supreme Court held that “it is not admissible for a public service company to demand a different rate, charge or hire from various persons for an identical kind of service under identical conditions.” In *State ex rel. McKittrick v. Public Service Commission*, 175 S.W.2d 857, 866 (Mo. banc 1943), the Court stated that “[h]aving two or more rates for the same service is the thing forbidden by the non discrimination statute, Sec. 5645 [now § 393.130].” Case law makes it clear that the classification of utility service is to be based upon the characteristics of the utility service provided, not on a circumstance of the customer. The statutes forbid charging one residential customer one rate, and charging another residential customer a different rate.

The Commission finds that granting MGE’s application for variance would result in the body of ratepayers being forced to make a charitable contribution to MAAC. The Commission has previously held that ratepayers should not be required to fund utility contributions to charitable causes. *Laclede Gas Company*, 9 Mo.P.S.C. (N.S.) 97, 115 (1960); *Joplin Waterworks Company*, 14 Mo.P.S.C. (N.S.) 280, 286 (1969). The worthiness of the cause or of the charitable organization contributed to is not at issue here; instead, the problem lies with the fact that ratepayer dollars are flowed through to a charitable organization without regard for whether the individual ratepayer would have chosen to make the contribution or not. *In Re St. Louis County Water Co*, 94 PUR 4th 96 (Mo.P.S.C. 1988).

In these times of record cold temperatures and unprecedented high gas costs, many are suffering from extremely high gas bills. The Commission is sympathetic to the plight of all ratepayers, and is particularly concerned for low income ratepayers who are having difficulty paying their gas bills. Nonetheless, the Commission finds that it is prohibited by Missouri statutes and case law from granting the requested variance. The Commission determines that in addition to

²In its Report and Order in EM-2000-292 and EM-2000-369, the Commission noted that “[l]ow-income customers have not previously been accorded status as a separate class of consumer when utility rates are designed.” EM-2000-292 Report and Order, pp. 29-30 (December 24, 2000), and EM-2000-369 Report and Order, pp. 26-27 (January 7, 2001).

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the legal prohibition, approval of the waiver is not consistent with sound public policy. Although sympathetic to the plight of MGE's low income ratepayers, the Commission notes that all ratepayers are facing hardships due to the increased cost of gas. MGE's proposal would take funds from customers who are not eligible for other assistance with this winter's high gas bills and would contribute those funds to a select few customers. The proposal would result in MGE ratepayers being forced to contribute to a charitable organization, a practice the Commission finds inappropriate, even though well intentioned. Although the Commission commends MGE for its ingenuity and generosity in making its proposal, the application for variance must be denied.³

IS THEREFORE ORDERED:

1. That the Application for Variance filed by Missouri Gas Energy, a division of Southern Union Company, on January 18, 2001, is denied.
2. That this Report and Order shall become effective on March 16, 2001.

Lumpe, Ch., Drainer, and Murray, CC., concur;
Simmons, C., dissents, with dissenting opinion attached;
certify compliance with the provisions of Section 536.080, RSMo 2000.
Schemenauer, C., not participating.

DISSENTING OPINION OF COMMISSIONER KELVIN L. SIMMONS

Today, the Missouri Public Service Commission determines whether Missouri Gas Energy (MGE) can use certain federal refunds and unauthorized use charge collections for the benefit of low-income customers in the company's service area. It is my belief that the Commission can and should grant MGE's request, however, today the Commission declines that request and I respectfully dissent.

In the Bible, at Psalms 41:1, it says, "Blessed is he that considereth the poor: The Lord will deliver him in time of trouble." There is no argument that throughout the service territory of MGE, the state of Missouri and this nation, the poor, low income and senior citizens are being hit especially hard with the burden of paying unusually high heating bills. It goes without question that in extraordinary times such as these, numerous governmental bodies have sought to protect the poor from circumstances beyond their control. I believe the Commission also has the

³ The Commission would like to commend MGE for its recent efforts to alleviate some of the suffering of its ratepayers. As previously noted, MGE has given \$250,000 to MAAC to be used to assist low income ratepayers who are having difficulty paying their natural gas bills. MGE has also provided \$15,000 to the Division of Family Services (DFS) so that temporary workers can be hired for Jackson and Clay Counties to assist DFS in processing LIHEAP paperwork that has a backlog of approximately six weeks. In addition, MGE indicated that it has restored service to approximately 700 households which were without heat, receiving little more than a promise to pay from those households.

discretion to seek to protect the poor by granting MGE's request and thereby to offer relief to low income customers who are paying an extremely large percentage of their available financial resources just to keep their homes safely heated this winter. I believe it to be in the public interest to grant the request and I believe it is sound public policy.

At the urging of the Staff of the Missouri Public Service Commission (Staff) and the Office of the Public Counsel (Public Counsel), the Commission has concluded that it cannot lawfully grant the requested variance. I disagree.

Section 393.130.2, RSMo 2000, provides, in relevant part, that:

No gas corporation . . . shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas . . . or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

Section 393.140(11) provides, in pertinent part:

No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified . . . or any rule or regulation . . . except such as are regularly and uniformly extended to all persons and corporations under like circumstances. . . .

The Commission concludes that, read individually or together, these two sections prohibit the requested variance. However, the fact is, were the variance granted, MGE would continue to charge and receive its tariffed rate for gas service. MGE's proposal does not include any special or reduced rate; there would be no collection or receipt of a different or less compensation, no refund or remittance of any portion of a bill. Rather, MGE proposes to donate certain funds to a third party, a not-for-profit social assistance agency, the Mid-America Assistance Coalition, Inc. (MAAC), which will in turn distribute the funds to eligible ratepayers to assist them in paying their bills to MGE. MGE's proposal does not include any of the actions forbidden by the cited statutes.

The Commission concludes that MGE's proposed variance is also prohibited by Section 393.140(11), which provides: "nor shall any corporation refund or remit

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in any manner or by any device any portion of the rates or charges so specified . . . except such as are regularly and uniformly extended to all persons and corporations under like circumstances[.]” Similarly, Section 393.130.2 prohibits both indirect and direct rebates not extended to all similarly situated customers. But, MGE’s proposal does not include any rebate or refund, either direct or indirect. A “rebate” is “[a] deduction from an amount to be paid or a return of part of an amount given in payment.” *American Heritage Dictionary* (2nd College ed. 1985) at 1031. A “refund” is “[a] repayment of funds”; “an amount repaid.” *Id.*, at 1040. The money in question was never collected from the ratepayers as rates and cannot, consequently, be repaid, rebated or refunded to them. The money in question came, for the most part, from Williams Pipeline Co. pursuant to an order of the Federal Energy Regulatory Commission (FERC); the rest came from unauthorized use penalties. This money is MGE’s money and it is not subject to the provisions on which the Commission relies. MGE should be permitted to donate this money to MAAC for the purpose of assisting the poor during this difficult heating season.

The Commission also relies on Section 393.130.3, RSMo 2000, which prohibits a utility from granting “any undue or unreasonable preference or advantage to any person[.]” First, MGE’s proposal is neither undue nor unreasonable; rather, it is a sensible solution to a very real problem. Second, MGE’s proposal involves a charitable donation to a not-for-profit agency; the proposal does not involve MGE granting an advantage, or imposing a disadvantage, on anyone. This section, too, simply does not apply to MGE’s proposal.

It has also been suggested that, were the Commission to grant the variance, there would be an unconstitutional taking of private funds, or that the ratepayers would thereby be forced to underwrite the charitable purposes of the utility. Both positions are wrong. The money in question does not now belong to the ratepayers and it never did. Consequently, a takings analysis under the Due Process Clause of the Fourteenth Amendment, United States Constitution, is inapplicable here.¹ The money is MGE’s and the PGA tariff exacts it from MGE as a *quid pro quo*, the price of admission to the PGA/ACA program. Likewise, as it is not the ratepayers’ money, it follows that its donation to MAAC cannot be an involuntary donation by the ratepayers.

Because the Commission *can* grant the requested variance, the Commission *should* grant it. The Staff and the Public Counsel take the position that to do so would be poor public policy. They are wrong. MGE’s proposal is an extraordinary, one-time mechanism directed at the suffering caused by this extraordinary, unusual winter. Public policy is flexible enough to encompass unusual solutions for unusual problems. How can compassion be poor public policy? How can it be a mistake to provide for those who cannot provide for themselves? The United States Congress, the Missouri General Assembly, and many Missouri municipalities have taken steps to assist the poor this winter with their energy needs. It would appear that the general consensus is that what is proposed here is *good* public policy. It is particularly troubling to me that the Public Counsel takes this position.

For these reasons, I respectfully dissent.

¹This analysis applies equally to the Due Process Clause in the Missouri Constitution.

In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service.*

Case No. TT-2001-139
Decided March 6, 2001

Evidence, Practice & Procedure §27. The Commission denied requests for rehearing filed by various parties because "sufficient reason" for rehearing did not appear in the applications.

ORDER DENYING REHEARING

On February 8, 2001, the Commission issued its Report and Order in this matter. Thereafter, on February 16, 2001, timely applications for rehearing were filed by Cellco Partnership and CyberTel Cellular Telephone, doing business as Verizon Wireless, Southwestern Bell Telephone Company, Southwestern Bell Wireless, L.L.C., ALLTEL Communications, Inc., and Sprint Spectrum, L.P., doing business as Sprint PCS. The Alma Group and the Mark Twain Group of filing companies responded in opposition on February 21 and February 26, respectively. The Commission has reviewed the applications for rehearing and finds that they present nothing new. Inasmuch as "sufficient reason" for rehearing does not appear in the applications, the same shall be denied. Section 386.500.1, RSMo 2000.

IT IS THEREFORE ORDERED:

1. That the Applications for Rehearing filed herein by Cellco Partnership and CyberTel Cellular Telephone, doing business as Verizon Wireless, Southwestern Bell Telephone Company, Southwestern Bell Wireless, L.L.C., ALLTEL Communications, Inc., and Sprint Spectrum, L.P., doing business as Sprint PCS on February 16, 2001, are denied.
2. That this order shall become effective on March 6, 2001.
3. That this case may be closed on March 7, 2001.

Lumpe, Ch., Drainer, and Simmons, CC., concur.
Murray, C., dissents, with dissenting opinion attached.
Schemenauer, C., not participating.

Thompson, Deputy Chief Regulatory Law Judge

* See page 29 for another order in this case. On March 31, 2001, this case was appealed to Cole County Circuit Court (01CV323740). On January 3, 2002, this case was appealed to the Missouri Court of Appeals, Western District (WD60928).

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I respectfully dissent from the majority's refusal to grant the Wireless Interveners' requests for rehearing and reconsideration of the February 8 Report and Order which was voted out in my absence.

Approval of the tariffs will not provide effective incentives for negotiation of reciprocal compensation agreements, as the majority seems to claim. In fact, the tariffs will have the opposite effect. The filing companies will no longer have any incentive to negotiate reciprocal compensation for indirect interconnection. Furthermore, the blocking provisions of the tariffs are untenable.

I believe that the majority erred in approving the tariffs. Therefore, I dissent from this Order Denying Rehearing.

In the Matter of Terre Du Lac Utilities Corporation Water Rate Increase Request.**In the Matter of Terre Du Lac Utilities Corporation Sewer Rate Increase Request.***

*Case Nos. WR-2000-68 & SR-2000-69
Decided March 6, 2001*

Water §16. Sewer §14. The Commission approved rates on an interim basis, pending Terre Du Lac's compliance with agreements addressing safety and adequacy of services and just and reasonable delivery of services.

FINAL ORDER AND ORDER CLOSING CASE

On July 26, 1999, Terre Du Lac Utilities Corporation (Company) filed revised tariff sheets pursuant to an agreement between the Company and the Commission's Staff (Staff) for both water and sewer rate increases pursuant to the Commission's Small Company Rate Increase Procedure under 4 CSR 240-2.200.

The Commission issued its Order Approving Tariffs and First and Supplemental Agreements on March 14, 2000. Under the Supplemental Agreement, the tariffs were approved for service rendered on and after April 1, 2000, on an interim basis and these cases were held open to address the matters set out in the Supplemental Agreement. The Supplemental Agreement addressed service, quality and management concerns raised by the public and verified by the Staff and the Office of the Public Counsel (Public Counsel). The Supplemental Agreement required specific actions of the Company and continued monitoring and reporting by each of the parties.

The Staff was directed to file its report on compliance and recommendations related to the Supplemental Agreement no later than September 30, 2000. The

*See page 49, Volume 9 MPSC 3d for another order in this case.

Public Counsel was provided an opportunity to file a similar report no later than September 30, 2000. These dates were subsequently extended at the request of the parties.

Staff filed a report on October 13, 2000. Each of the matters related to the Supplemental Agreement was addressed but not all matters were resolved. The Commission issued its Order Directing Filing on November 21, 2000, to obtain a further resolution of the matters presented. On December 22, 2000, Staff filed its Response to Order Directing Filing. On February 1, 2001, the parties filed a Joint Response to Order Directing Filing and Motion to Close Cases.

The Supplemental Agreement presented items A – K as additional agreed upon actions. Items A – I presented additional undertakings by the Company. Items J and K provided for approving the subject tariffs on an interim basis, compliance reporting for Items A – I, and keeping these cases open to accept the reports and to issue a final order. Staff's October 13, 2000, response and report indicated substantial compliance for Items A, B, F, and G. Items C, D, E, H and I were not resolved. Staff's December 22, 2000, response and report and the Joint Response of the parties filed on February 1, 2001, addressed the remaining items.

Item A

Beginning March 1, 2000, the Company will maintain a record of all customer calls received, including those received via its telephone answering machines, and will ensure that all entries on such records are completed. For service-related calls, the Company will use its "work order" record. For other types of customer calls, such as billing inquiries, the Company will use a record to be developed with the Staff and the OPC.

In its October 13, 2000, report Staff stated that the Company is keeping its records according to this provision. Staff stated that it would continue to monitor the Company's compliance during its routine inspections. Staff stated that no further actions regarding this provision are necessary.

Item B

Beginning March 1, 2000, the Company will complete a "work order" record for all system leaks discovered by Company personnel and/or reported by customers and will attach documentation of leak repairs, such as material lists and work notes, to such records pertaining to repaired leaks.

In its October 13, 2000, report Staff stated that the Company is keeping its records according to this provision. Staff stated that it would continue to monitor the Company's compliance during its routine inspections. Staff stated that no further actions regarding this provision are necessary.

Item C

The Company will continue to cooperate with the Staff in evaluating problems identified in its water system regarding low system pressure and will work with the Staff and the OPC in developing proposed solutions to those problems upon completion of the additional evaluations. As noted in the Staff's January 14 Report, additional evaluations are planned for early to mid summer.

In its October 13, 2000, report Staff states that the Company has cooperated to identify particular areas or locations of concern and that Staff and the Company have conducted pressure tests. In one location the problem was discovered to be with a customer's interior plumbing and not in the Company's system. In two other locations water system pressures fluctuated, but in each case the pressures were considered adequate by Staff and the tests showed system pressures were well above the minimum pressure required by the Department of Natural Resources. The Staff indicated that Staff and the Company should continue to conduct pressure checks in response to customer complaints.

Staff and Company also identified potential system improvements to address this concern. The improvements under consideration provide for installation of telemetry system controls for the Company's wells and additional equipment at the Company's water storage tank. The costs would range from \$8,950 to \$18,980 depending on the particular improvements implemented.

In its December 22, 2000, report, Staff concluded substantial expenditures for these improvements were not presently warranted but advised that monitoring and case-by-case responses by the Company should continue.

Item D

The Company will continue to evaluate the condition of the sewer collections system in the Lac Carmel area through its own efforts and through cooperative efforts with the Staff. The initial evaluation program and a Company/Staff joint report on the results of that program will be completed by May 31, 2000. Upon completion of the report, a copy of the report will be provided to the OPC. Representatives of the Company, the Staff and the OPC will then work to develop an agreed-upon plan of corrective actions and an acceptable schedule under which the corrective actions will be carried out.

In its October 13, 2000, report Staff stated that the Company had undertaken an evaluation through its own efforts as well as with Staff. Staff stated that the Company had acted to address some problems by purchasing a sewer "rodding machine" which is being used to clear clogged manholes and sewer lines and to clear tree roots from the system. Staff stated that a joint report has not yet been completed.

Staff stated that it would obtain additional information from the Company and report on the issues presented by the Company's sewer collection system. Staff indicated that following the completion of the report a plan of corrective actions based on the report is still needed.

Staff stated in its subsequent report filed on December 22, 2000, that the Company was taking necessary steps to improve the quality and efficiency of its gravity sewer system through its purchase and use of the mobile sewer cleaner and through plans for a program of selective main replacements and manhole rehabilitation.

In the Joint Response filed on February 1, 2001, the Company agreed that it would not seek any further rate increase without first addressing replacement on a limited basis of collecting sewers presenting the most severe problems, and further agreed that it would obtain bids for manhole rehabilitation and determine, in consultation with Staff and the Public Counsel, the cost/benefit of proceeding with such a program.

Item E

The Company will provide a copy of the results of the forthcoming "total water quality" tests, which are to be conducted by the Department of Natural Resources, of the Company's three wells to the Staff. Subsequent to receipt of those test results, the Staff will forward a copy of the results to the OPC and the Terre Du Lac Property Owners Association (POA). The Staff will then organize a meeting with representatives of the Company, the OPC and the POA to discuss possible corrective actions, if such actions appear warranted.

In its October 13, 2000, report Staff stated that it had not received the Company's "total water quality" report. The Joint Response of Parties filed on February 1, 2001, indicated that the Company provided the Staff with two sets of reports conducted by the Missouri Department of Natural Resources. The reports showed that none of the Company's three wells exceeded maximum contaminant levels and that the test results were in fact significantly under these levels. With respect to secondary standards, the tests showed that two of three wells tested in excess of the recommended standard for iron and were somewhat high for hardness and alkalinity.

The Company agreed in the Joint Response filed on February 1, 2001, to obtain bids to determine the costs of addressing the concerns with the secondary standards, and agreed that it would not seek any further rate increase without obtaining this information and performing a cost/benefit analysis in consultation with Staff and the Public Counsel.

Item F

Beginning March 1, 2000, the Company will keep time records for all persons that receive compensation from Company funds as employees of the utility company. Such persons

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include the Company's field operations personnel, the Operations Manager, the Office Manager and the Company's owner.

In its October 13, 2000, report Staff stated that the Company is keeping its records according to this provision. Staff stated that it would continue to monitor the Company's compliance during its routine inspections and would review these records in future rate case audits. Staff recommended that the Company continue to keep these records.

Item G

Beginning March 1, 2000, the Company will keep usage logs for all equipment and vehicles that it shares with its owner's development company, with those usage logs showing separately the amount of time the equipment and/or vehicles were used for utility company business and development company business.

In its October 13, 2000, report Staff reported that on August 14, 2000, the Company advised the Staff that equipment sharing between the Company and the development company was no longer occurring. The Company indicated that it would keep usage logs in the future if equipment were shared. Staff stated that no further actions would be required.

Item H

The Company agrees to implement a policy whereby work pertaining to establishing service to new customers is done on a "first-come, first-served" basis. The Company also agrees to implement a policy whereby emergency utility company work is given priority over all other work in which the Company's employees may be involved. Such policies will be in place and a copy of them will be provided to the Staff and the OPC by May 30, 2000.

In its October 13, 2000, report, Staff reported that the Company had advised Staff that it was following the policies described. However, the Company had not reduced the policies to writing. On November 21, 2000, the Commission ordered the Company to prepare written policies for defining its practices and priorities for responding to service calls and submit them to Staff and Public Counsel no later than November 30, 2000. In its December 22, 2000, report, Staff advised the Commission that the Company complied with this order.

Item I

The Company agrees to conduct a survey of its sewer system to identify structures that now have the collection system available for service, but which are not yet connected to the collection system. The company will complete this survey and

provide a report on it to the Staff by May 30, 2000. Subsequent to receipt of that report, the Staff will forward a copy of the report to the OPC and the POA. The Staff will then organize a meeting with representatives of the Company, the OPC and the POA to discuss possible resolution of such situation.

According to Staff's October 13, 2000, report, the Company provided a listing initially identifying 53 homes in the Terre Du Lac development where the sewer collection system was available for service, but which were not yet connected. The Company and the POA (Property Owner's Association) sent letters to these homeowners and as of July 12, 2000, 22 of the 53 homes had connected to the system. The Company and the POA were considering contacting the St. Francois County Health Department regarding the 31 homes that had not yet connected to the system.

The Staff stated that it would obtain an update identifying structures serviceable by the sewer collection system but not connected to the sewer collection system and review the connection issues with the Company, the Public Counsel and the local owners association to determine if any further actions are needed in regard to this situation.

In its December 22, 2000, report Staff fixed responsibilities for connection issues and enforcement with the Company, the POA and the local county health departments, collectively. The parties did not address this issue any further in the Joint Response filed on February 1, 2001.

**No Further Action Required for Final Disposition
of Small Company Rate Increase Cases**

The Supplemental Agreement was entered into between the Company, the Staff and the Public Counsel to address concerns regarding the management and operations of the Company that were brought to the Commission's attention by the public during the consideration of the Company's rate increase requests. The parties presented a plan to address the concerns presented by the public in their Supplemental Agreement. The Commission approved the agreements presented by the parties and approved the agreed-upon rate increases on an "interim" basis as agreed by the parties. See Order Approving Tariffs and First and Supplemental Agreements, Case Nos. WR-2000-68 and SR-2000-69, March 14, 2000.

The reports and responses filed by Staff and the Joint Response filed by the Staff, Company and the Office of the Public Counsel, demonstrate substantial and ongoing compliance by the Company with the terms of the Supplemental Agreement. No further action is required in these cases, and the rate increases approved on an interim basis can now be made final and these cases closed.

IT IS THEREFORE ORDERED:

1. That the substitute tariff sheets set out below and approved for service rendered on and after April 1, 2000, on an interim basis pending the Commission's final order in this case, are finally approved.

P.S.C. MO. No. 1 (Water Service)
4th Revised Sheet No. 8, Canceling 3rd Revised Sheet No. 8
Original Sheet No. 8A

P.S.C. MO. No. 1 (Sewer Service)
5th Revised Sheet No. 9, Canceling 4th Revised Sheet No. 9
2nd Revised Sheet No. 9A, Canceling 1st Revised Sheet No. 9A

2. That this order shall become effective on March 16, 2001.
3. That these cases may be closed on March 17, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur.

Thornburg, Regulatory Law Judge

In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996.*

Case No. TO-99-227
Decided March 6, 2001

Telecommunications § 1. The Commission found that Southwestern Bell Telephone Company's Missouri 271 Interconnection Agreement (M2A) as revised, met the requirements of the 47 U.S.C. §271(c). The Commission directed that the M2A be made available to competitive local exchange companies.

Telecommunications § 1. The Commission supported Southwestern Bell Telephone Company's application with the Federal Telecommunications Commission for authority to provide in-region interLATA telecommunications service within Missouri.

ORDER FINDING COMPLIANCE WITH
THE REQUIREMENTS OF SECTION 271 OF THE
TELECOMMUNICATIONS ACT OF 1996

On November 20, 1998, Southwestern Bell Telephone Company (SWBT) notified the Missouri Public Service Commission (Commission) of its intent to file

*Please see pages 69, 73, 150, 409, 429 and 432 for other orders in this case. In addition, see page 181, Volume 9 MPSC 3d, for another order in this case.

with the Federal Communications Commission (FCC) its application for authority to provide interLATA telecommunications services in Missouri under Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104 104, 110 Stat. 56 (the Act). Section 271(d)(2)(B) of the Act provides that the FCC shall consult with the appropriate state commission before ruling on the application of any Bell operating company ("BOC") to provide in-region, interLATA service.

Since November 20, 1998, the Commission has held proceedings and received testimony and other evidence to determine if SWBT has complied with the requirements of the Act and, therefore, whether the Commission can give a positive recommendation to the FCC for SWBT's entry into the interLATA market when SWBT's application is filed with the FCC.

Following full evidentiary hearings held between March 1 and March 10, 1999, the Commission issued an order directing the Missouri Public Service Commission Staff (Staff) to hire outside consultants to evaluate and verify the data underlying SWBT's performance measurements. After the conclusion of a request for proposal process, the Staff recommended that Ernst & Young perform a validation of SWBT's performance measures and verify that Telcordia's test of SWBT's five-state operating and support systems was sufficient to address anticipated commercial volumes of competitive local exchange carrier (CLEC) orders doing business in Missouri.

SWBT filed a Motion to Update the Record and for Approval of the Missouri 271 Interconnection Agreement on June 28, 2000, supported by detailed affidavits. Taking advantage of the extensive record developed by the Texas Public Utilities Commission in a similar proceeding, SWBT filed the Missouri 271 Interconnection Agreement (M2A), which is modeled after the Texas 271 Interconnection Agreement (T2A). The T2A has been reviewed and approved by the Texas Public Utilities Commission and SWBT's application for interLATA authority in the state of Texas, including the prices, terms and conditions of the T2A, has been approved by the FCC.

The M2A as originally filed generally followed the substantive terms of the T2A, but also incorporated this Commission's arbitration decisions as well as other modifications described in the affidavits accompanying SWBT's draft Application. The M2A provided terms for inter-connection, access to unbundled network elements (UNEs) (including combined UNEs not currently combined in SWBT's network), and resale. The M2A will be effective for one year after this Commission's finding that it complies with the requirements of Section 271. Upon the FCC's approval of SWBT's 271 Application in Missouri, the terms of the M2A may be extended for an additional three years.

Following responses by intervening parties, SWBT filed supporting reply affidavits on September 20, 2000. The Commission then conducted extensive on-the-record question and answer sessions on October 11-12, 2000, and then again on November 8-9, 2000. The Commission gave each CLEC that chose to participate every opportunity to raise any issue in response to SWBT's request for authority to provide interLATA long-distance services in Missouri. On November 20,

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2000, SWBT filed an updated M2A that incorporated numerous revisions to which SWBT had agreed in the course of the proceedings in this case. The intervening parties filed responses to the question and answer sessions and to the updated M2A. At the direction of the Commission, the parties also filed summaries of their evidence and position statements.

On January 31, 2001, the Commission held a final on-the-record conference with the parties. On January 30, 2001, the parties met with Ernst & Young in a technical conference to discuss their evaluation, and reports regarding that conference were filed on February 13, 2001. Also on February 13, 2001, the Commission issued an Interim Order Regarding the Missouri Interconnection Agreement (Interim Order) in which it explained its current position and indicated areas in which it found that SWBT was not yet in compliance with Section 271(B) of the Act. Following the order, SWBT filed another revised M2A and the parties filed responses and requests for reconsideration.

Final revisions to the M2A were filed by SWBT on February 28, 2001. Staff filed a response on March 1, 2001, stating its opinion that, with the final revisions, SWBT's revised M2A was fully compliant with the Interim Order.

In the Act, BOC provision of in region, interLATA service is conditioned on compliance with the provisions of Section 271. Pursuant to Section 271, BOCs must apply to the FCC for authorization to provide interLATA services in each state within the BOC's region. With respect to each state within the region, the BOC must show that:

(1) it satisfies the requirements of either section 271(c)(1)(A), known as "Track A" or 271(c)(1)(B), known as "Track B"; (2) it has "fully implemented the competitive checklist" or that the statements approved by the state under section 252 satisfy the competitive checklist contained in section 271 (c)(2)(B); (3) the requested authorization will be carried out in accordance with the requirements of section 272; and (4) the BOC's entry into in-region, interLATA market is "consistent with the public interest, convenience, and necessity."¹

After extensive hearings and comments, the Commission finds that SWBT's application and the M2A as finally revised on February 28, 2001, satisfies the requirements of 47 U.S.C. § 271(c) for authority to provide interLATA services in Missouri. Further, the Commission finds that SWBT's entry into the interLATA long-distance market in Missouri is in the public interest, provided that the M2A is made available to Missouri competitive local exchange carriers.

¹ *Memorandum Opinion and Order, In re: Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, FCC Docket No. 00-217, (rel. Jan. 22, 2001), ¶ 8.

Based on the extensive record in this case, the availability of the M2A to Missouri CLECs², and the Commission’s intention to expeditiously determine permanent rates, terms and conditions, for collocation, line sharing, line splitting, loop conditioning, and unbundled network elements, the Commission supports SWBT’s application to the FCC. The Commission’s detailed opinion with specific findings of fact and conclusions of law will follow.

IT IS THEREFORE ORDERED:

1. That the Missouri Interconnection Agreement filed by SWBT on February 16, 2001 as revised on February 28, 2001, is found to meet the requirements of 47 U.S.C. § 271(c), and shall be made available to competitive local exchange companies on the effective date of this order.
2. That the Missouri Public Service Commission supports SWBT’s application for authority to provide in-region interLATA telecommunications service within Missouri.
3. That this order shall become effective on March 6, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur.

Dippell, Senior Regulatory Law Judge

**In the Matter of Missouri Public Service’s Purchased Gas
Adjustment factors to be reviewed in its 2000 2001 Actual
Cost Adjustment.**

*Case No. GR-2001-461
Decided March 6, 2001*

Gas §17.1. Tariff number 200200348, submitted in case number GR-2001-461 on November 5, 2001, by Missouri Public Service Company, a division of UtiliCorp United Inc., is approved on an interim basis, subject to refund, for service rendered on and after November 19, 2001.

ORDER APPROVING INTERIM RATES

Missouri Public Service Company, a division of UtiliCorp United Inc. (UtiliCorp) filed tariff sheets with the Missouri Public Service Commission (Commission) on February 23, 2001, carrying an effective date of March 9, 2001. Substitute sheets were filed March 1, 2001. The tariff sheets reflect unscheduled changes in

² According to Section 2.1 of the General Terms and Conditions of the M2A, by finding that the M2A complies with the competitive checklist and supporting SWBT’s application for in region interLATA authority in Missouri, the M2A will become available to Missouri CLECs.

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UtiliCorp's Purchased Gas Adjustment (PGA) factors as the result of changes in the estimated cost of natural gas for the remaining winter heating season. The winter heating season includes the months of November through March. Additionally, the proposed tariff sheets reflect an Unscheduled Filing Adjustment Factor.

UtiliCorp stated that it delayed filing its unscheduled winter season PGA to stabilize its rates during the past winter months. UtiliCorp indicated that delaying this unscheduled PGA increased the under-recovery of its deferred carrying cost balance (DCCB). Therefore, UtiliCorp stated, it is requesting a one-time waiver from its Tariff Sheet No. 36 to allow it to forego adding interest to its DCCB until the next PGA change. This will reduce the under-recovery balance that residential customers will pay in the coming months.

On March 2, 2001, the Staff of the Missouri Public Service Commission (Staff) filed its Memorandum and Recommendation in this case. Staff recommended that UtiliCorp's proposed tariff sheets be approved for service on and after March 9, 2001, as an interim rate, subject to refund. Staff further advised the Commission that UtiliCorp has shown good cause such that its tariff sheets should be approved on less than 30 days' notice.

For UtiliCorp's Southern System, the effect of these changes will increase the firm PGA factor for the remainder of the 2001 winter season to \$0.78774 per Ccf from a scheduled winter season firm PGA factor of \$0.58957 per Ccf. For UtiliCorp's Northern System, the effect of these changes will increase the firm PGA factor for the remainder of the 2001 winter season to \$0.86348 per Ccf from a scheduled winter season firm PGA factor of \$0.67027 per Ccf. For UtiliCorp's Eastern System, the effect of these changes will increase the firm PGA factor for the remainder of the 2001 winter season to \$1.16476 per Ccf from a scheduled winter season firm PGA factor of \$0.92690 per Ccf.

Staff stated that UtiliCorp's proposed PGA factor changes were calculated in conformity with UtiliCorp's PGA Clause. Staff further stated that UtiliCorp's PGA Clause allows for 10 business days' notice for filings reflecting PGA changes and that, under the circumstances, good cause exists to approve the proposed tariff sheets on less than 30 days' notice. Staff recommended that the Commission approve the tariff sheets to become effective March 9, 2001, on an interim basis, subject to refund, pending a final Commission decision in UtiliCorp's ACA Case Nos. GR-99-435, GR-2000-520, and GR-2001-461.

The Commission has reviewed the proposed tariff sheets and Staff's Memorandum and Recommendation. The Commission finds that the tariff sheets conform to the company's Commission approved PGA Clause and are therefore reasonable. This unscheduled increase in UtiliCorp's rates is necessary because of the current extraordinarily high price of natural gas. If the price of natural gas drops in coming months, the Commission encourages UtiliCorp to file for an unscheduled reduction in its PGA tariffs.

After considering Staff's recommendation, and for good cause shown pursuant to Section 393.140(11) RSMo 2000, the Commission concludes that the proposed tariff sheets should be approved to become effective on and after the requested effective date of March 9, 2001, interim subject to refund.

IT IS THEREFORE ORDERED:

1. That Tariff No. 200100868, submitted in Case No. GR 2001 461, by Missouri Public Service Company, a division of UtiliCorp United Inc., is approved on an interim basis, subject to refund, for service rendered on and after March 9, 2001. The tariff sheets approved are:

P.S.C. Mo. No. 5
22nd Revised Sheet No. 43, Canceling 21st Revised Sheet No. 43
25th Revised Sheet No. 44, Canceling 24th Revised Sheet No. 44
15th Revised Sheet No. 44.1, Canceling 14th Revised Sheet No. 44.1

2. That this order shall become effective on March 9, 2001.

Lumpe, Ch., Drainer and Murray, CC., concur Simmons, C., dissents with dissenting opinion to follow Schemenauer, C., not participating

Hopkins, Senior Regulatory Law Judge

**In the Matter of a Recommendation Concerning the Surcharge
for Dual Party Relay.***

Case No. TR-2001-182
Decided March 6, 2001

Telecommunications §2. The Commission ordered implementation of a statewide dual-party telephone relay service in Case TO-90-174 for deaf, hearing impaired and speech impaired customers.

Rates § 81. The Commission ordered the surcharge per access line to be reduced from thirteen cents to nine cents. The balance of the surcharge account was large enough to fund the statewide dual-party telephone relay service after reducing the surcharge.

ORDER ESTABLISHING SURCHARGE

The Missouri Public Service Commission ordered the implementation of the Relay Missouri program in Case No. TO-90-174. The Relay Missouri program is a statewide dual-party telephone relay service for the deaf, hearing impaired and speech impaired, which was created pursuant to Section 209.253, RSMo 2000. Pursuant to a Commission order dated February 19, 1991, the initial surcharge

*See pages 476 through 483, Volume 30, New Series, for orders in Case No. TO-90-174.

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was set at six cents per month per access line. Since that time, the surcharge was raised to thirteen cents per month per access line by Commission order dated October 2, 1992, and remains at that level.

According to Section 209.259, RSMo 2000, the Commission is required to review the surcharge periodically in order to ascertain that necessary funds are available for the provision of the program. The Commission last reviewed the surcharge in Case No. TR-99-123.

Pursuant to a request by the Staff of the Commission, the Commission opened this case to review the surcharge which funds the Relay Missouri program. Sprint Communications L.P. and Sprint Missouri Inc., and Southwestern Bell Telephone Company were granted intervention.

On February 14, 2001, Staff filed its recommendation in which it recommends that the surcharge be reduced to nine cents per month per access line. Staff stated that the balance in the deaf relay service and equipment distribution program (DRS and EDP) fund at the end of December 2000 was \$7,691,948. Staff states that, during fiscal year 2000, monthly revenues exceeded disbursements by a large margin (\$487,757 and \$306,035 per month, respectively). Staff projects that using a nine cent surcharge would significantly reduce the fund balance, and the approximate fund balance in June 2003 would be \$894,000. Staff notes that, regardless of whether the Commission decreases the surcharge now, it expects that the surcharge will need to be increased sometime in the future. No responses to the Staff recommendation were filed.

The Commission has reviewed the Staff's recommendation and finds it appropriate. The Commission finds that Staff's proposed Relay Missouri surcharge amount is just and reasonable. Missouri law requires the Commission to review these issues periodically, but allows review no more often than annually. Section 209.259, RSMo 2000. Accordingly, the Commission will direct the Staff to continue to monitor the Fund in light of the issues set out in its recommendation.

IT IS THEREFORE ORDERED:

1. That the Relay Missouri surcharge shall be reduced to nine cents per month per access line.
2. That local exchange companies shall notify their customers of the decrease by a notice included with or printed on each customer's bill.
3. That the Staff of the Commission shall monitor the Deaf Relay Service and Equipment Distribution Program Fund in light of the issues set out in its recommendation.
4. That this order shall become effective on April 5, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

In the Matter of Tariff Revisions of The Empire District Electric Company Designed to Increase Rates on an Interim Basis for Electric Service to Customers in its Missouri Service Area.

Case No. ER-2001-452
Decided March 8, 2001

Electric §20. With a pending rate case before the Commission, the request for immediate, interim rate relief must be supported by a showing of negative returns in the period before the rate case is concluded, a showing that there is a risk that the ability to provide safe and adequate service will be impaired or a showing of an inability to finance the operations of the company.

Rates §117. With a pending rate case before the Commission, the request for immediate, interim rate relief must be supported by a showing of negative returns in the period before the rate case is concluded, a showing that there is a risk that the ability to provide safe and adequate service will be impaired or a showing of an inability to finance the operations of the company.

ORDER REJECTING TARIFFS AND GRANTING MOTION TO DISMISS

On February 16, 2001, The Empire District Electric Company (Empire) filed revised tariff sheets together with supporting testimony, a motion for a protective order, and a motion for expedited treatment. The revised tariff sheets would allow Empire to put in place a two-step surcharge increasing Empire's Missouri electric revenues by approximately \$16.8 million for March through September 2001. The tariff sheets bear an effective date of March 18, 2001, and Empire requested that they be approved as early as March 1, 2001.

According to Empire, the need for immediate rate relief is driven by expected increases in natural gas prices, and the projected in-service date of a new combined cycle generating unit. In the testimony of David W. Gibson, Empire states that, because of changes Empire made to prepare for a now-defunct merger with UtiliCorp United Inc. (UCU), its capital structure is not normal. Mr. Gibson testified that Empire is considering several financing alternatives, and does not find the prospect of issuing stock attractive. Empire believes that issuing trust preferred stock may give it an opportunity to obtain financing while waiting for rate relief. According to Mr. Gibson, and as discussed in more detail in the testimony of Stan M. Kaplan, Empire projects that increases in natural gas prices will have a detrimental effect on Empire during 2001 before the new permanent rates (determined in Empire's currently pending general rate case, Case No. ER-2001-299) would be in place. Mr. Gibson concedes that Empire's proposed interim rate request is, at least in part, an attempt to avoid regulatory lag.

In the testimony of William L. Gipson, Empire states that it lost many talented and long-term employees in expectation of consummating the failed merger with UCU. Mr. Gipson also states that travel and seminars or conferences have been curtailed. Mr. Gipson argues that allowing Empire's rate of return to fall below what it considers acceptable levels, even for the short period of time before new

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permanent rates will be established in Case No. ER-2001-299, will impair Empire's ability to provide safe and reliable electric service to its customers. However, Mr. Gipson points out that he does not mean that there will be any direct impact on Empire's ability to provide safe and reliable electric service, but rather that a dip in Empire's returns may influence credit rating agencies, which in turn could affect its cost of new debt and ability to raise equity capital. Neither Mr. Gipson nor the other Empire witnesses provide explanation of how a possible increase in its cost of capital could impair Empire's ability to provide safe and reliable electric service to its customers.

Empire's third witness, Stan M. Kaplan, testified that the increase Empire seeks to receive with its proposed interim tariffs is mostly based on Empire's expectation that the price of natural gas in the next several months will be higher than the price during the same period last year. Mr. Kaplan's testimony explains why Empire projects this increase.

On February 20, 2001, Praxair, Inc. (Praxair) filed a motion to intervene. Praxair's motion complies with the Commission's rule on intervention (4 CSR 240-2.075) and no party opposed it. Praxair will be granted intervention. Praxair, in addition to requesting intervention, requested that the Commission suspend the tariff filing and establish a procedural schedule including evidentiary hearings.

On February 22, 2001, the Staff of the Commission (Staff), in response to a Commission order, filed its recommendation that the Commission suspend the tariff sheets and establish a procedural schedule. Staff concluded that Empire has not presented a set of facts and circumstances that would support a grant of interim relief. Staff asserted that, in order to meet the standard for interim relief, a utility must be facing an emergency or near emergency situation. Staff stated that a utility must show that: 1) it needs the funds immediately; 2) the need cannot be postponed; and 3) that no other alternatives exist to meet the need but rate relief.

Staff identified a number of concerns with Empire's request for interim relief. Staff stated that Empire's claimed need for immediate relief is based on projected, rather than actual, gas prices. Staff also stated that the need is highly dependent on the in-service date of the new combined cycle generating unit. Staff noted that Empire has no emergency financing crisis, and that any problems with capital structure are of Empire's own making. Staff argued that the refund provision in the proposed tariff does not protect Empire's customers, and that Empire may not have accurately reflected savings that offset its projected increased costs.

On February 26, 2001, the Office of the Public Counsel (Public Counsel) filed a motion to dismiss and a motion to remove the Highly Confidential designation from portions of Empire's filing.¹ Public Counsel found no justification in Empire's testimony or pleadings that would meet any standard that the Commission has used to review interim rate relief requests. Like the Staff, Public Counsel pointed out that Empire's request is based largely on projections. Public Counsel also concurred in the long list of concerns raised by the Staff. Public Counsel suggested a connection between Empire's request for interim relief and House Bill 723, which

¹ Because the Commission is herein rejecting Empire's tariff filing and closing the case, it will not address Public Counsel's motion to remove the Highly Confidential designation.

would permit a pass-through of projected gas costs through a fuel adjustment surcharge. Public Counsel asked, since Empire's filings do not demonstrate a need for interim relief, that the Commission dismiss Empire's request.

On March 1, 2001, Praxair filed a response opposing Empire's interim request. Praxair, like the Staff and Public Counsel, asserted that Empire has failed to show, or even allege, that it needs interim relief. Praxair also noted that Empire has failed to recognize actual cost savings that may offset its projected cost increases. On March 5, 2001, Praxair filed pleadings supporting Public Counsel's motions to dismiss and to remove the Highly Confidential designation from portions of Empire's testimony.

On February 28, 2001, Empire filed a response to Staff and Public Counsel. Although Empire stated that it needs timely interim relief to maintain its financial integrity, it clarified that, to Empire, maintaining its financial integrity means it needs a quick infusion of revenue to sustain its earnings at a reasonable level.

In its pleadings and testimony, Empire focuses on the word "need" and asserts that it needs an interim rate increase in order to maintain what it believes is an acceptable rate of return. The proper application of the standard is that a utility must need an interim rate increase in order to meet the emergency or near emergency it faces.² The Commission determines that, even viewing its testimony in the light most favorable to Empire, Empire has not demonstrated that it needs interim relief. Empire does not allege that it is not earning a positive return, or that its earnings will be negative in the period before new rates are determined in Case No. ER-2001-299. Neither does Empire allege any risk that its ability to provide safe and adequate service will be impaired in that period. Finally, Empire does not allege inability to finance its operations. The Commission will reject the proposed interim tariffs and grant Public Counsel's motion to dismiss.

IT IS THEREFORE ORDERED:

1. That the following tariff sheets filed by The Empire District Electric Company on February 16, 2001, and assigned Tariff File No. 200100851, are rejected:

P.S.C. MO No. 5

Section A, 14th Revised Sheet No. 1 canceling Section A,
13th Revised Sheet No. 1
Section 4, Original Sheet No. 21

2. That the motion to intervene filed by Praxair, Inc. on February 20, 2001, is granted.
3. That the motion to dismiss filed by the Office of the Public Counsel on February 26, 2001, is granted and this case is hereby dismissed.
4. That all other motions not heretofore expressly ruled upon are hereby denied.

² As Empire notes in its pleadings, the Commission did partially develop a "good cause" standard for interim relief in *In Re The Empire District Electric Company*, 6 MoPSC 3rd 17 (Case No. ER-97-82). However, in that case the Commission based its denial of Empire's request on its conclusion that: "There is no showing by the Company [Empire] that its financial integrity will be threatened or that its ability to render safe and adequate service will be jeopardized if this request is not granted." The differences, if any, between this good cause standard and the historically applied emergency or near emergency standard were not clearly annunciated, and the Commission now returns to its historic emergency or near emergency standard.

5. That this order shall become effective on March 18, 2001.
6. That this case may be closed on March 19, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur.

Mills, Deputy Chief Regulatory Law Judge

**In the Matter of the Application of the City of Rolla, Missouri,
for an Order Assigning Exclusive Service Territories and
for Determination of Fair and Reasonable Compensation
Pursuant to Section 386.800, RSMo 1994.**

*Case No. EA-2000-308
Decided March 15, 2001*

Evidence, Practice & Procedure §4. In a proceeding under Section 386.800, the municipally-owned electric utility has the burden of proof.

Electric §4.1. In a proceeding under Section 386.800, where the record showed that a municipally-owned electric utility had misled the public prior to an annexation election as to whether an established rural electric cooperative would be permitted to continue to serve its existing customers in the annexed area and both utilities were otherwise equally capable of serving the area in question, the Commission concluded that forced sale proposed by the municipally-owned electric utility was not in the public interest.

APPEARANCES

Gary W. Duffy, Esq., Brydon, Swearengen & England, P.C., Post Office Box 456, Jefferson City, Missouri 65102-0456, for the City of Rolla.

Mark W. Comley, Esq., Newman, Comley & Ruth, 601 Monroe, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102, for Intercounty Electric Cooperative Association.

Edward D. Hoertel, Esq., Hoertel & Hoertel, Post Office Box 4, Suite 207, Scott Building, Rolla, Missouri 65402, for Intercounty Electric Cooperative Association.

William E. Gladden, Attorney at Law, 205 North Grand Avenue, Post Office Box 217, Houston, Missouri 65483, for Intercounty Electric Cooperative Association.

Michael Dunbar, Esq., Smith, Dunbar & Turley, 266 Marshall Drive, St. Robert, Missouri 65583, for the Southside Neighbors.

M. Ruth O'Neill, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65101-780, for the Office of the Public Counsel and the public.

Dennis L. Frey, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

REPORT AND ORDER

Procedural History

On October 29, 1999, the City of Rolla, Missouri (City or Rolla), filed an application with the Commission seeking an order pursuant to Section 386.800, RSMo 2000,¹ assigning exclusive service territories and determining fair and reasonable compensation. According to its application, the area concerned is a tract containing approximately 1,350 acres, recently annexed by the City, which presently receives electric service from Intercounty Electric Cooperative Association (Intercounty).

On November 3, 1999, the Commission issued its Order Directing Notice and Adding a Party, by which Intercounty was made a party herein. That Order also established a deadline for applications to intervene. Accordingly, on December 2, 1999, an association of 16 persons collectively styled the Southside Neighbors filed their timely application to intervene. The Commission granted intervention on December 17, 1999.²

On December 3, 1999, Intercounty filed its response to City's application. That response contained a motion to dismiss and a number of contingent motions, to be taken up only if the motion to dismiss should be denied. City replied on December 13. On January 18, 2000, the Commission denied Intercounty's motion to dismiss, extended the time for decision for an additional 120 day period, granted the request that a local public hearing be held, set a prehearing conference for February 1, and required the filing of a proposed procedural schedule. The prehearing conference was later reset and held on March 1. On January 24, Intercounty sought a protective order, which was adopted on February 24.

On March 8, 2000, the parties jointly filed a proposed procedural schedule and motion to again extend the time for decision. The extension sought ran nearly a year. The parties explained that this was a case of first impression under the governing statute and that much discovery was required to prepare the case for hearing. On March 29, the Commission granted the parties' motion and extended the time for decision herein to March 15, 2001. The Commission also adopted the proposed procedural schedule with only minor modifications and the usual conditions.

¹ All references herein to the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 2000.

² These persons were Don Priest, Mary Ellen Irwin, Virginia Hays Priest, Marvin Koynenbelt, John E. Happel, Brooks R. Read, Diana L. Henry, Alva Branson, Tom Green, Barbara Crowley, Danny Winstead, Sharlyn Winstead, Nadine Jones, Calvin Jones, Deborah C. Volz, and Steven A. Volz. Six of them, including Calvin and Nadine Jones, Danny and Sharlyn Winstead, Mary Ellen Erwin, and Brooks Read, were permitted to withdraw as parties on May 19, 2000.

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Pursuant to the procedural schedule, prepared direct testimony was filed on June 1, 2000, and prepared rebuttal testimony was filed on July 18. Following an extension requested by Rolla on September 8, and granted by the Commission on September 27, prepared surrebuttal and cross surrebuttal testimony was filed on October 18. The local public hearing was held on October 23.

On November 14, 2000, as required by the procedural schedule, Staff filed a list of contested issues for determination by the Commission, a list of witnesses and the date each would appear, and an agreed order of cross-examination. The parties filed their position statements on November 21.

On November 14, Intercounty filed its motion to compel responses to data requests from City, with supporting suggestions. On November 16, Intercounty sought leave to file supplemental rebuttal testimony. On November 17, the Commission directed City to respond to Intercounty's motion to compel by November 21. Meanwhile, Intercounty filed its second motion to compel City to respond to data requests on November 17. City responded in opposition to the first motion to compel on November 21, as directed by the Commission, and, on November 22, responded to Intercounty's request for leave to file supplemental rebuttal testimony. On November 27, Intercounty replied to Rolla and submitted further suggestions in support of its motions to compel. City replied to Intercounty's further suggestions on November 29. On December 1, the Commission denied Intercounty's motions to compel and its motion for leave to file supplementary surrebuttal testimony.

On November 29 and December 1, the Public Counsel filed motions seeking pre-approval of certain exhibits. The Commission granted these motions at the opening of the hearing and received the exhibits into the record.

An evidentiary hearing was held on December 4 and 5, 2000. All parties were represented at the hearing and were afforded the opportunity to present evidence and argument and to cross-examine witnesses. Also on December 4, Intercounty filed its Motion to Reconsider Order Regarding Motion to Compel and Motion to File Supplemental Rebuttal Testimony. On December 7, the Commission issued its briefing schedule.

On December 8, 2000, the parties unanimously moved the Commission to modify its Order Directing Filing of December 7, 2000, with respect to the page limitation imposed on the briefs of the parties. The Commission granted that motion on December 15.

On December 18, 2000, Public Counsel filed its Motion to Accept Late-filed Exhibits. On December 19, Public Counsel filed Late filed Exhibits 24 and 25. Also on December 19, the parties filed the Joint Reconciliation pursuant to the Procedural Schedule. Public Counsel filed its Supplement to its Motion to Accept Late filed Exhibits on December 20.

On January 19, 2001, The parties timely filed their initial briefs. Reply briefs were filed on February 9, 2001.

Late-filed Exhibits:

No objections were filed to Late-filed Exhibits 24 and 25; consequently, they are received and made a part of the record of this matter.

Objection of Improper Use of a Summary of Records:

At the hearing, Intercounty objected to lines 22:12 through 26:8 of Exhibit 4, the prepared Surrebuttal Testimony of Rolla Municipal Utilities' (RMU's) witness Rodney Bourne, on the grounds that it represented the improper use of a summary of records. This objection was taken with the case in order to permit Rolla an opportunity to review the case cited by Intercounty and to formulate a response.

The testimony in question concerns Mr. Bourne's effort to determine the age of Intercounty's facilities in the annexed area by obtaining, from the Phelps County Assessor, the date when each structure in the tract was added to the tax rolls, on the theory that the associated electric distribution facilities were approximately the same age as the structure they served.

Intercounty objected, relying on *Sigrist By and Through Segrist v. Clark*, 935 S.W.2d 350 (Mo. App., S.D. 1996). That case held:

The use of summaries to help make voluminous records understandable is approved in *The Bolling Co. v. The Barrington Co.*, 398 S.W.2d 28, 31 (Mo. App. 1965). Generally, a summary of records is admissible where the records upon which the summary is based are voluminous, are admissible and are available to the opposing party for inspection. *Ahrens & McCarron, Inc. v. Mullenix Corp.*, 793 S.W.2d 534, 539-40 (Mo. App. 1990). Nevertheless, the determination of the admissibility or exclusion of evidence is within the sound discretion of the trial court. Although certain evidence may be relevant, it is within the discretion of the trial court to exclude the evidence if its probative value is outweighed by its prejudicial effect. See *Stevinson v. Deffenbaugh Indus., Inc.*, 870 S.W.2d 851, 860 (Mo. App. 1993); *Trejo v. Keller Indus., Inc.*, 829 S.W.2d 593, 596 (Mo. App. 1992). Much as in the case of demonstrative evidence, the trial court is clothed with considerable discretion in its admission. See *McElhiney v. Mossman*, 850 S.W.2d 369, 371 72 (Mo. App. 1993). In *Erwin v. State Farm Fire & Casualty Co.*, 618 F.Supp. 1040, 1042 (E.D. Mo. 1985), the Court ruled that an exhibit setting forth the contents of a conversation in which certain phrases were underlined should be excluded. The Court stated that it was "an obvious attempt to highlight those portions of the exhibit." *Id.*

935 S.W.2d 350 at 356. The *Segrist* court went on to approve the exclusion of a summary of medical records where garish colors were used to draw attention to procedures likely to have been painful. *Id.* The exclusion was based on the familiar rule of evidence which permits the discretionary exclusion of items whose probative value is outweighed by the potential for prejudice. *Id.*

Turning to the matter at hand, we note first that *Segrist* was tried to a jury and that a much greater concern for the possibly prejudicial effect of exhibits necessarily existed. Second, neither Schedule RB 4 to Exhibit 4 nor the lines of prepared

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testimony objected to by Intercounty are garishly colored; neither are either of them “argumentative.” A thorough review of these items shows that there is no practical danger of undue prejudice; therefore, the objection is overruled and the designated testimony is received into the record.

Rehearing and Reconsideration:

On December 4, 2000, Intercounty filed its Application for Rehearing and Motion to Reconsider Order Regarding Motion to Compel and Motion to File Supplemental Rebuttal Testimony. Intercounty’s two motions to compel, and its motion for leave to file supplemental rebuttal testimony, were denied by the Commission on December 1. At the hearing, Intercounty tendered the proposed testimony in question, Exhibit 15, as an offer of proof and it was received as such. Because Intercounty’s application and motion present nothing new, they will be denied.

Discussion

Pursuant to the Commission’s Order Adopting Procedural Schedule and Extending Time for Decision, the parties jointly prepared and filed a list of issues for resolution by the Commission and each party then filed a statement of its position with respect to each issue.

1. Is the City of Rolla’s request for an assignment of the exclusive territory and transfer of Intercounty Electric Cooperative Association’s (“Intercounty”) facilities in the public interest?

1.A. What effect will there be with regard to electric distribution lines in the annexed area if the Commission does not approve the application of Rolla Municipal Utilities (“RMU”)?

1.B. What effect, if any, will RMU’s acquisition of the facilities within the annexed area have on its operations, rates for service and quality of service?

1.C. What effect, if any, will RMU’s acquisition of the facilities in the annexed area have on Intercounty’s operations, rates for service and quality of service?

1.D. What effect, if any, will RMU’s acquisition of the facilities in the annexed area have on Intercounty’s existing customers in the annexed area?

1.E. Will RMU’s new wholesale electric supplier agreement, and related wheeling agreements, if any, have any effect on customer rates or on service reliability?

1.F. What effect, if any, will RMU’s lease/purchase of trailer mounted generation equipment have on customer rates, or service reliability?

1.G. Should Intercounty’s position on payment of a gross receipts tax or payment in lieu of tax, and other services, and any reliance of the City of Rolla on Intercounty’s position, be considered with respect to the interest of the public in this case?

1.H. Should the City’s Revised Plan of Intent be considered with respect to the interest of the public in this case?

2. Should the Commission assign the annexed area, in whole or in part, to the City of Rolla as its exclusive territory?

3. If the Commission determines that the annexed area, in whole or in part, should be assigned to the City of Rolla as its exclusive territory, what is the amount of “fair and reasonable compensation” to be paid Intercounty for its facilities?

3.A. What is the present day reproduction cost, new, of Intercounty's properties and facilities, serving the annexed area?

3.B. Should Intercounty's district office building located at 1310 South Bishop Ave. (Highway 63), Rolla, Missouri, be included in the calculation of fair and reasonable compensation, and if so, in what amount?

3.C. Should Intercounty's reliance, if any, on the City's Plan of Intent be considered in determining whether Intercounty's district office building should be included in the calculation of fair and reasonable compensation?

3.D. What particular approach should be adopted by the Commission in order to calculate depreciation in this case?

3.E. What is the amount of depreciation to be deducted from the calculation of present-day reproduction cost, new, of the properties and facilities serving the annexed area?

3.F. What are the reasonable and prudent costs of detaching Intercounty's facilities in the annexed area, and what are the reasonable and prudent costs of reintegrating Intercounty's system outside the annexed area after detachment?

3.F.1. Should the reasonable and prudent costs of detaching the facilities and reintegrating the system include:

- a) Intercounty's engineering costs related to the detachment of facilities and reintegration of the system?
- b) Intercounty's costs for detachment of its main tie lines?
- c) Intercounty's costs of pole and line construction for reintegrated lines?
- d) Intercounty's transfer of service costs, including final meter readings and crew time?
- e) Intercounty's transfer of facilities costs and demolition costs for removal of facilities?
- f) Intercounty's costs of acquiring and clearing right of way and obtaining right of way easements?
- g) Intercounty's costs to maintain service to stranded customers by the erection of new facilities?
- h) Intercounty's costs of reintegrating telephone, fiber optic, computers and communications systems?
- i) Intercounty's administrative costs associated with the above?

3.F.2. If the Commission determines that an item listed in 3.F.1. above should be included in the reasonable and prudent costs, then how much of the cost of each of the following items should be included?

- a) Intercounty's engineering costs related to the detachment of facilities and reintegration of the system?
- b) Intercounty's costs for detachment of its main tie lines?
- c) Intercounty's costs of pole and line construction for reintegrated lines?
- d) Intercounty's transfer of service costs, including final meter readings and crew time?
- e) Intercounty's transfer of facilities costs and demolition costs for removal of facilities?

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- f) Intercounty's costs of acquiring and clearing right of way and obtaining right of way easements?
 - g) Intercounty's costs to maintain service to stranded customers by the erection of new facilities?
 - h) Intercounty's costs of reintegrating telephone, fiber optic, computers and communications systems?
 - i) Intercounty's administrative costs associated with the above?
- 3.F.3. What is 400 percent of Intercounty's gross revenue less gross receipts taxes for the 12 month period preceding the approval of the Rolla city council to begin negotiations with Intercounty for the exclusive territory and for transfer of the facilities?
- a) What customers or structures should be included/excluded in the calculation of same?
 - b) How should the gross revenue calculation be normalized to produce a representative usage?
4. Other Costs/Issues Related to Calculating Fair and Reasonable Compensation:
- 4.A. Should the condition of Intercounty's easements, or lack thereof, in the annexed area be considered in the calculation of fair and reasonable compensation, and if so, in what amount and manner?
 - 4.B. Should the Commission order PCB testing of Intercounty's facilities in conjunction with the transfer, and if so, in what manner?
 - 4.C. Should joint use fees collected pursuant to Intercounty's pole attachment agreements be considered in the calculation of fair and reasonable compensation?
 - 4.D. Should the equity owed to the Intercounty members in the annexed area be considered in the calculation of fair and reasonable compensation?
 - 4.E. Should Intercounty's additional wholesale power costs be considered in the calculation of fair and reasonable compensation?

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Rolla Municipal Utilities:

RMU provides electrical and water service to some 8,000 residential, commercial and industrial customers. RMU has operated since 1945. RMU's rates are set by the Board of Public Works and not by the citizens of Rolla. The meetings of the Board of Public Works are open to the public and the agenda is published. The agenda provides an opportunity for public comment.

RMU is a component unit of the City of Rolla, a city of the third class. RMU is run by its own board, the Board of Public Works, which is appointed by the Mayor of Rolla, with the advice and consent of the Rolla City Council. Rolla also has a city administrator. Ultimately, RMU and the City of Rolla are one and the same.

RMU purchases the power it distributes, it does not generate it. At the time of hearing, RMU had a full requirements contract with AmerenUE and had had one for about 50 years; however, a new full requirements contract with a new supplier, Missouri Public Energy Pool (MOPEP), took effect on January 1, 2001. MOPEP is a municipal power pool. After January 1, 2001, RMU will still receive its power over AmerenUE's transmission lines. The new power supply agreement would not result in any rate increase for RMU's customers.

In August 2000, the Rolla City Council authorized RMU to acquire 14 trailer-mounted generating units on a ten year lease-purchase at \$802,000 annually. While the record does not disclose the purpose for which RMU acquired these units, it does disclose that they will be connected in parallel with RMU's existing system and that they will be available to provide power in emergencies.

On September 30, 1999, RMU's retained earnings balance was \$17,465,440. On the same date RMU's unrestricted cash and investment balance was \$8,362,122 and its liabilities were \$1,817,893. RMU's net income for the year ended September 30, 1999, was \$1.7 million. RMU's retained earnings have been increasing, year by year. RMU's Operation Expenses for Fiscal Year 1999 were \$12,386,326.82; its Operation Income for that fiscal year was \$14,001,006.77.

RMU contributes a percentage of its revenues to Rolla in the form of a set quarterly payment. This is a generally accepted practice in Missouri local government. RMU transfers money to the city for administrative costs. The City Council can also request RMU to transfer money to the city in addition to the set quarterly payments. The City government then uses this money as it pleases. In the past, money transferred by RMU to the City has been used to build a new police station, to build a recycling center, and to purchase a building for the location of a factory operated by a private corporation.

Historically, RMU has made expenditures for economic development purposes. The State Auditor has criticized some of RMU's transfers to Rolla. In 1997, the State Auditor criticized RMU for spending \$1.3 million over the previous five years on economic development in addition to city administrative costs. However, taking its set quarterly contributions and the special draws together, RMU contributes 5.8 percent of its revenues to Rolla annually.

RMU has had outages in the past. One outage resulted in the cancellation of school in the City of Rolla. That outage, and the single other city-wide outage over the past three years, resulted from failure of AmerenUE's transmission lines. RMU's outages are often reported in the Rolla newspaper.

RMU has one service center in Rolla. Crews can reach any location in the city from the service center in ten minutes. RMU also has a "state-of-the-art" Supervisory Control and Data Acquisition system for dispatching crews. RMU prioritizes service restoration according to this guideline: (1) remove dangers to the general public, (2) restore emergency service and communications, and (3) restore general service. A citizens' attitude survey conducted by RMU in 1994 showed a

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93 percent approval rating. RMU does not have a formal system to accept and act upon written service complaints from customers.

RMU has never given a capital credit or a refund to its customers.

Intercounty Electric Cooperative Association:

Intercounty has provided electric service for 60 years. Intercounty has a total of 28,100 customers in six rural counties. Intercounty operates 5,385 miles of distribution lines over 2,500 square miles. Intercounty's headquarters are at Licking, Missouri. Intercounty is controlled by a board of directors elected by its customers. Intercounty buys power from Associated Electric Cooperative, Inc., of Springfield, via Sho-Me Electric Power Cooperative.

Intercounty has over \$73 million of utility plant in service and its annual revenues exceed \$27 million. Since 1995, Intercounty has returned \$7 million in capital credits to its members. Intercounty has been adding an average of 718 customers annually. Intercounty's customers experience service outages from time-to-time. Given Intercounty's size and the size of the annexed area, the proposed transfer would have little impact on Intercounty.

Intercounty already serves 113 customers within Rolla's city limits as a result of previous annexations. These customers are not located together in one area, but are scattered through the City. This has resulted in duplication of facilities. Associated safety concerns have been mitigated by adherence to the National Electric Safety Code, although at some additional cost.

The Southside Neighbors:

The persons cooperatively litigating herein in opposition to the forced sale proposed by Rolla are all present residents of the annexed area and customers of Intercounty.

The Other Parties:

The Staff of the Commission is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the Commission in all actions and proceedings involving this or any other law [involving the Commission.]" Section 386.071, RSMo 2000.³

The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]" Sections 386.700 and 386.710.

The Annexed Area:

The annexation process was lengthy and began in 1994. This is the first annexation by Rolla in 20 years.

Rolla annexed approximately 1,350 acres on the south side of the City, effective June 8, 1998. The annexation election was held on April 8, 1998.

³ Unless otherwise specified, all statutory references herein are to the Revised Statutes of Missouri (RSMo), revision of 2000.

There are 197 properties in the annexed area, some of which have multiple meters. Only about 25 percent of the annexed area was developed at the time of annexation. Intercounty has 286 customers in the annexed area. This is equivalent to about 40 percent of Intercounty's annual growth.

Intercounty serves the annexed area with four three phase feeder lines from three Sho-Me Electric substations, with tied together or looped backfeeds. Additionally, single-phase taps extend throughout the area to serve existing Intercounty customers. RMU has calculated the load of the annexed area at 2,500 to 3,500 kW; Intercounty calculated it at 2.5 MW. Intercounty recently rebuilt the north distribution feeder from its South Rolla Substation to 477 MCM to provide for backfeeds, reliability and growth. Intercounty's substations have ample capacity for present needs and for future growth. Intercounty's trunk lines in the annexed area were built in the 1940s. About 99 percent of Intercounty's system consists of overhead construction.

Approximately 80 percent of the existing structures in the annexed area were built before 1976, and 44 percent before 1965. Since the annexation, one new subdivision has been platted in the annexed area and two others are planned.

RMU's existing substations have enough capacity to serve the annexed area.

Rolla's Plan of Intent:

Rolla had to prepare a Plan of Intent (POI) as part of the annexation process. Rolla's POI went through two revisions. The POI represented the official position and actual intentions of the City. At page 9, the second POI, dated November 26, 1996, stated:

The areas within the proposed annexation that are now receiving electric service from a rural electric cooperative would continue to do so. RMU would not be allowed to serve any of these properties. Any new development within this area would receive electric service from RMU. It is the policy of RMU to absorb the cost of any electric extension, and this would continue to be the case. The proposed financing of electric extensions into the proposed annexation area is to use electric reserve funds to install any new lines.

Originally, RMU planned to allow Intercounty to continue to serve its existing customers in the annexed area under a franchise, while RMU would serve new structures. This plan was repeatedly publicized prior to the annexation election. This plan was approved by the circuit court when it certified the annexation election and this plan was relied on by the voters when they approved the annexation.

However, after the election, RMU realized that it lacked authority to impose a franchise tax on a cooperative. During the negotiations, Intercounty declined to make a voluntary contribution in lieu of tax or to provide free energy for street lighting. Rolla then decided to pursue this action.

Rolla sent out survey cards in the annexed area when it determined to seek to extend its services into the annexed area. Approximately a third of the respondents

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avored receiving electric service from the City. Intercounty also surveyed its customers in the annexed area. Intercounty's poll of 76.5 percent of its members in the annexed area showed that 93.8 percent favored continued service by Intercounty over service by RMU.

Rolla's witness, Watkins, testified that the transaction would not go forward, regardless of the Commission's decision in this case, if the Rolla City Council withheld final approval.

The Negotiations:

The Rolla Board of Public Works approved the beginning of negotiations between RMU and Intercounty in the third week of June, 1998. The City Council approved them on September 8, 1998.

On July 15, 1998, RMU had published the notice required by Section 386.800.3(1) that it intended to extend its system into the annexed area. Prior to this date, the residents of the annexed area did not know that RMU intended to extend its system into the annexed area. Neither had they been informed regarding any proposed payment in lieu of tax by Intercounty to Rolla.

Likewise, RMU provided written notice to Intercounty and to the Commission on July 13, 1998. RMU then obtained the consent of the Rolla City Council and entered into negotiations with Intercounty. The negotiations extended over approximately one year, the statutory period of 180 days having been extended by the Commission on March 3, 1999. The negotiation period expired on September 3, 1999, and Intercounty filed its application with the Commission on October 29, 1999.

What is the Fair and Reasonable Compensation?

RMU contends that \$1,285,210.83 is fair and reasonable compensation.

Intercounty, on the other hand, asserts that fair and reasonable compensation amounts to \$4,037,604.01.

1. The Reproduction Cost New (RCN):

Intercounty considers the RCN to be \$547,131.01. RMU accepts the RCN of \$547,131.01. This figure has been corrected to \$742,131.01.

Intercounty, however, has revised its RCN figure upwards to \$1,046,115.06 as explained by its consultant, Ledbetter. Administrative, engineering, easement fees, staking, and right-of-way acquisition and clearing costs in the amount of \$195,000 should be added to the value of Intercounty's existing facilities, as estimated by Intercounty's witness, Ledbetter. Intercounty also included the value of its office building in the annexed area in the calculation, at \$1,000,229.16.

RMU excluded Intercounty's Rolla office building/warehouse from the calculation. Ledbetter valued this building at \$1,000,229.16. Intercounty insists that the building remain in its service area so that Intercounty will serve it. RMU is willing to allow Intercounty to continue to serve its office building, even if the Commission finds in favor of RMU. If RMU does not purchase the office building, it need not spend \$53,000 to relocate and reintegrate Intercounty's associated communications equipment.

RMU believes it should not have to pay the patronage or capital credits owed by Intercounty to its members in the annexed area, an amount of \$402,649.39.

2. Straight Line Depreciation (SLD):

In accounting, assets are depreciated in order to allocate their benefit to the years that actually receive the benefit. Under Generally Accepted Accounting Principles (GAAP), straight line depreciation (SLD) is calculated by dividing the cost of an asset by its estimated useful life.

Intercounty's expert, Ledbetter, multiplied RCN by 71.69 percent to reach a depreciated value of Intercounty's assets. This is the systemwide figure used by Intercounty pursuant to regulations of the United States Rural Utilities Services (RUS). Intercounty depreciates its system over 35 years.

Ledbetter testified that the depreciation method used by RMU misstated the age and condition of Intercounty's facilities.

Intercounty uses a system-wide depreciation rate of 2.8 percent. This is the depreciation rate applicable to Intercounty's assets at issue in this case. However, Intercounty's system-wide depreciation method should not be used in this case. Intercounty's witness, Ledbetter, miscalculated Intercounty's depreciation and did not calculate it as the statute requires or in accordance with GAAP. Ledbetter failed to depreciate each class of asset separately and thereby produced a skewed result. Under GAAP, you cannot determine a depreciation rate by subtracting total accumulated depreciation from total fixed assets, you must use the age of the assets. Ledbetter's result was skewed because population growth is exponential and population growth drives a corresponding growth in utility assets.

Present value can be determined from the estimated replacement cost, the estimated useful life and the age of the assets. To calculate net book value, or present value, accumulated depreciation must be subtracted. Total depreciation can be expressed as a percentage of total investment, as can present value. The average age of an asset can be calculated by dividing total depreciation, as a percentage of total investment, by the annual depreciation percentage.

The statute's requirement of reproduction costs, new, eliminates any need to identify improvements made over time. Reproduction costs, new, could be greater or lesser than market value in any given instance.

Different types of assets have different useful lives, thus, the applicable annual depreciation percentage rate varies from class to class. Intercounty uses an estimated useful life of 35.71 years and an annual rate of 2.8 percent to depreciate their electric distribution facilities.

3. The Age of Intercounty's Facilities:

Intercounty lacks specific age records for much of its distribution system. A review of records shows that Intercounty acquired the easements in the annexed tract between 1938 and 1952. The four main subdivisions in the area were platted from the mid to the late 1950s ('53, '55, '57, '59), another in the 1960s ('63), and two in the 1970s ('73, '74).

RMU estimates that 44 percent of Intercounty's facilities were installed prior to 1965 and were fully depreciated by 2001. RMU assumes that the remaining 26 percent were installed prior to 1976 and have been depreciated for 25 of

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36 years, leaving only 11 years of value, or \$50,554.90. RMU assumes that any components installed after 1976 are maintenance, not improvements or new facilities. Intercounty, however, presented testimony that over half of the 286 services in the area were constructed, revamped, or had a transformer change since 1980.

Staff calculated the age of Intercounty's facilities based on the median age of the transformers in the annexed area. The median age was 19.74 years as of June 8, 1998.

4. What is RCN less SLN?

RMU calculated RCN less SLD at \$66,791.79. Intercounty, in turn, calculated RCN less SLD at \$749,959.89. Staff calculated it as \$331,955.70.

5. Compensation for Lost Revenues:

RMU calculates 400 percent of 12 months gross revenues, normalized, to be \$1,481,853.80. This was calculated from a list of customers and associated revenues over a 14 month period from July 1997 to August 1998 provided to RMU by Intercounty. RMU plotted each customer on a map and excluded those found to be outside the annexed tract. RMU then deleted the revenue for the two months July 1998 and August 1998, to find the actual revenue realized for the 12 months immediately preceding annexation.

RMU then deleted the CT Farm and Country Store, which burned down after the annexation, and the Charles Moreland property, which has also been demolished since the annexation. Rolla's expert witness, Rodney Bourne, believed that only RMU could lawfully serve new structures erected on these plots, so RMU shouldn't have to provide any compensation to Intercounty with respect to them. RMU considered the removal of these parcels to be "normalization" as called for by the statute. However, the CT Farm and Country Store was being served by Intercounty during the 12 months next preceding the date the negotiations were approved.

Later, RMU adjusted its position and decided that the 12 months base revenue of \$370,463.45 should be reduced by 27 percent to reflect discounts and patronage, to \$291,703.51. 400 percent of this amount is \$1,166,814.04. Discounts and patronage are amounts rebated by Intercounty to its customers, thus reducing gross revenues.

Intercounty calculated 400 percent of normalized revenues to be \$1,548,294.96. Discounts and patronage capital were not removed from base revenues in making this calculation.

No normalization was undertaken by RMU in its calculations, other than removal of the CT Farm and Country Store and the Moreland property, because Intercounty indicated that it did not consider the historical revenues to be abnormal. Intercounty normalized the base revenue amount by assuming full occupancy. RMU contended that the revenues should not be adjusted to account for temporary vacancies because such are normal.

Staff started with the annual base revenue figure constructed by Mr. Bourne, then included the CT Farm and Country Store and Moreland property revenues excluded by Bourne, and did not gross up apartments and the like to 100 percent

occupancy as did Ledbetter. Using these assumptions, Staff calculated compensation for lost revenue at \$1,534,145.96.

6. Other Matters:

A. Intercounty's Easements:

Intercounty uses blanket easements which permit them to locate their facilities anywhere on a parcel of land. Intercounty's easements sometimes do not include a legal description, some are not notarized, and many others were never recorded. Intercounty was unable to produce easements with respect to part of their system. In other cases, Intercounty placed its facilities outside of the platted easement. RMU may have to resort to condemnation in order to cure the defects in Intercounty's easements. RMU's position is that this creates a potential for future litigation such that \$408,892 should be deducted from the compensation paid by RMU to Intercounty.

Staff contends that the easements issue is outside of the Commission's jurisdiction. Intercounty suggests that, in this forced sale situation, RMU must take the easements as it finds them. After all, it need not take them at all.

B. Transfer, Detachment and Reintegration:

RMU determined the reasonable and prudent costs of detachment and reintegration to be \$80,000.

Originally, RMU developed a plan to minimize Intercounty's reintegration costs. RMU proposed that Intercounty maintain its 12.47 kV trunk lines that run through the annexed tract and link substations. RMU proposed that it reinstall these lines on higher poles that would permit RMU to also run lines through this existing corridor. This work would cost approximately \$80,000.

RMU later decided against this plan. This was partly because Intercounty's alternative plan better disposed of certain issues and partly because Intercounty refuses to enter into a joint use agreement with RMU. RMU's final position on reintegration is \$383,077.50. RMU also suggests that it will simply pay Intercounty's actual reintegration costs, whatever they are, up to a cap.

The transfer would occur in three stages over 24 months. The transfer of service would result in a service outage of one to two hours. RMU's witness, Bourne, accepts the estimate of witness Strickland that transfer of service costs would amount to about \$24,000.

C. Joint Use:

RMU and Intercounty have a long history of the joint use of poles. This has been accomplished without any joint use agreement. However, RMU will not engage in any additional, future joint use until Intercounty enters into a joint use agreement with RMU. There is not presently any prospect of a joint use agreement between Intercounty and RMU covering the entire annexed area.

Intercounty's expert, Ledbetter, testified that RMU's original plan, involving joint use of poles carrying trunk lines through the annexed area, was not feasible given economic and safety concerns. Ledbetter estimated \$593,120.00 to move and rebuild Intercounty's feeder lines.

D. Stranded Customers:

The proposed transfer would result in two stranded customers, who are located outside of the annexed area but are served by Intercounty facilities within the annexed area. These are the Harley Moore property and the Gary Buenger property. The former has been acquired and will be removed by the Highway Department as part of a right-of-way improvement project. RMU wants Intercounty to consent to the transfer of the latter to RMU. RMU, in exchange, will pay 400 percent of 12 prior months' compensation to Intercounty in the amount of \$5,775.36. This amount is included in the compensation figure proposed by RMU in this proceeding. Otherwise, Intercounty will have to build a new line, 1,470 feet long, to serve this single customer.

Intercounty's plan, to build new trunks around the annexed area, would create additional stranded customers: the Elks Lodge, the Faulkner property and the Elliott property. RMU's final position on reintegration of stranded customers is \$58,790.

Intercounty estimated it would cost \$146,000.00 to restore service to stranded customers.

E. PCB Contamination:

Because Intercounty will retain liability for any of its facilities that are contaminated with PCBs, Intercounty should be ordered to test all of its facilities in the annexed area so that any contaminated ones can be removed and not transferred.

Any accident with equipment not certified as PCB free requires a costly clean-up on the assumption of PCB contamination.

The Impact if the Forced Sale is Approved:

Upon being assured that it would retain its existing customers, Intercounty considered the impact of the transaction so slight that it did not bother to participate further in the annexation process.

The expert opinion of Andrew Marmouget is that RMU would not have to raise its rates if the Commission approved the proposed transfer and RMU paid a fair amount for Intercounty's assets.

The financial impact of the proposed acquisition on RMU would be slight. With respect to the annexed area, RMU expects first and second year operation expenses of \$282,075.54 and \$122,728.16, and first through third year operation revenues of \$14,400.00, \$241,920.00 and \$263,520.00.

Staff's expert witness, James Ketter, testified that the transaction, if approved, would have little effect on either system.

The Impact if the Forced Sale is Not Approved:

Upon being assured that it would retain its existing customers, Intercounty considered the impact of the transaction so slight that it did not bother to participate further in the annexation process.

If the Commission does not order the sale, RMU will build new pole lines and extend its services into the area as development occurs. This is not a problem at all in the undeveloped areas. In the developed areas, where Intercounty already

has pole lines in the back yards, RMU will have to build new lines along the street to reach the remaining vacant lots. There are already some areas in Rolla where RMU and Intercounty operate adjacent lines.

RMU will build a distribution system to serve the annexed area regardless of the outcome of this case. This has been understood by RMU ever since the annexation was approved by the voters. RMU always planned to serve any new structures in the annexed area and, consequently, always intended to build the requisite facilities. If the Commission does not approve the transfer, the new facilities built by RMU will be duplicative of Intercounty's existing facilities. Essentially, two distribution systems will exist to serve the same area. RMU is already serving new structures in the annexed area with newly constructed facilities.

Construction of duplicate systems in the annexed area is an aesthetic issue. It can also be a safety issue. However, safety concerns are minimized because all system construction, both existing and new, is to National Electrical Safety Code clearances. RMU's expert engineer, Rodney Bourne, testified that building to code would minimize any safety issues. It is also an economic issue in that the ratepayers would have to underwrite duplicative systems. Likewise, the duplicate facilities could not be used to their potential.

RMU's general manager, Watkins, was not able to articulate any negative financial impact on RMU or on the City if Intercounty is permitted to continue serving its current customers in the annexed area without payment of any tax or other contribution to Rolla.

The Public Interest:

RMU's rates are lower than Intercounty's by 25 percent. Additionally, RMU does not charge each customer a service fee of \$11.50 monthly as Intercounty does.

RMU takes the position that Intercounty cannot lawfully add new customers in the annexed area. Thus, should Intercounty keep its existing customers, RMU will have to build a duplicate system to serve new customers in the area. The existence of Section 386.800 shows that the General Assembly contemplated that municipal utilities would grow with the municipalities they serve.

RMU's general manager, Watkins, agreed that cheapest is not always best, that one has to examine the total package.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction:

Rolla is a Missouri city of the third class which owns and operates RMU as authorized by Chapters 77 and 91, RSMo, as a means of providing electric and water service to its citizens. The Missouri Public Service Commission regulates municipal utilities only with respect to territorial contests with other utilities. Section 91.025.

Intercounty is a rural electric cooperative, authorized by Chapter 394, RSMo, to provide electric service to customers in rural areas of Missouri. The Commission's jurisdiction over rural electric cooperatives is, in general, limited to matters of safety in construction, maintenance and operation. Section 394.160.

The Governing Statute:

The duty of the Commission in a proceeding under Section 386.800 is to issue “an order assigning exclusive service territories within the annexed area” with “a determination of the fair and reasonable compensation amount to be paid to the affected electric supplier under subsection 5 of this section.” Section 386.800.6. An exclusive service territory necessarily confers the right to serve both existing and future structures and customers within the defined territory. The Commission must resolve these questions “based on findings of what best serves the public interest,” *id.*, and, in doing so, must consider each of the following factors:

- (1) Whether the acquisition or transfers sought by the municipally owned electric utility within the annexed area from the affected electric supplier are, in total, in the public interest, including consideration of rate disparities between the competing electric suppliers and issues of unjust rate discrimination among customers of a single electric supplier if the rates to be charged in the annexed areas are lower than those charged to other system customers; and
- (2) The fair and reasonable compensation to be paid by the municipally owned electric utility, to the affected electric supplier with existing system operations within the annexed area, for any proposed acquisitions or transfers; and
- (3) Any effect on system operation, including, but not limited to, loss of load and loss of revenue; and
- (4) Any other issues upon which the municipally owned electric utility and the affected electric supplier might otherwise agree, including, but not limited to, the valuation formulas and factors contained in subsections 4, 5 and 6, of this section, even if the parties could not voluntarily reach an agreement thereon under those subsections.

Section 386.800.7.

The Commission “shall hold evidentiary hearings” and the Commission’s decision must take the form of a Report and Order. Section 386.800.6. In its decision, the Commission must “assign service territory between affected electric suppliers inside the annexed area” and “determine the amount of compensation,” if any, “due any affected electric supplier for the transfer of plant, facilities or associated lost revenues between electric suppliers in the annexed area.” *Id.*

The Burden of Proof:

Section 386.800, at subsections 6, 7 and 8, does not expressly impose the burden of proof on either party, that is, upon either the “municipally owned electric

utility” or “the affected electric supplier.” However, the statute does vest the power to seek resolution by the Commission exclusively in the “municipally owned electric utility”: “In the event the parties are unable to reach an agreement . . . the municipally owned electric utility may apply to the commission for an order assigning exclusive service territories within the annexed area and a determination of the fair and reasonable compensation amount to be paid to the affected electric supplier under subsection 5 of this section.” Section 386.800.6. The statute also includes certain express jurisdictional prerequisites, which presumably only the petitioning municipal utility has an interest in showing. See, e.g., Section 386.800.6, the application must be filed with the Commission “within sixty days after the expiration of the time specified for negotiations[.]” Therefore, we necessarily must conclude that the municipal utility has the burden of proof in this proceeding.

Is the Forced Sale Sought by Rolla in the Public Interest?

This is the first of the mandatory factors set out in Section 382.800.7 for consideration by the Commission. Rolla, which brought this action in order to force a transfer of Intercounty’s customers and facilities in the annexed tract, argues that the transfer is in the public interest for various reasons; Intercounty argues that it is not.

Rolla points to RMU’s lower residential rates and to the aesthetic, economic and safety concerns which all militate against duplicate electric distribution facilities. Intercounty, in turn, argues that it is the existing supplier and that most of the affected customers do not want their supplier to be changed. The Commission’s Staff, like Rolla, argues that the forced sale sought by Rolla is in the public interest. Staff recites that RMU’s facilities are closest to the annexed area, that RMU has the capacity to serve the annexed area with no loss of quality, that RMU’s service crews are closer, and that Intercounty would be unable to use its stranded facilities to their full capacity if the sale is not ordered. Staff also refers to the aesthetic, economic and safety concerns raised by Rolla. The Southside Neighbors, residents of the annexed area, oppose the forced sale. They emphasize the fact that, prior to the annexation election, RMU widely publicized its intention to allow Intercounty to continue to serve its existing customers in the annexed area. The Public Counsel did not express an opinion as to whether or not the forced sale would be in the public interest.

Having considered the evidence and the arguments of the parties, the Commission concludes that the transfers and acquisitions proposed by Rolla are not in the public interest.

The record shows that the annexation process took several years. Throughout that interval, until the very end, Rolla planned that Intercounty would continue to serve its existing customers in the annexed area. This intention was formally embodied in Rolla’s Plan of Intent, was publicized to the citizenry, and was relied upon by the voters who approved the annexation. Only after the annexation was effective did Rolla change its intention.

The foremost public interest in this matter is to ensure that the residents of the annexed area receive a safe and adequate electric service at a reasonable price. See, e.g., Section 393.130; and see *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). The record shows that both RMU and

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Intercounty are capable of providing such service and, although their rates are not identical, they are in each case reasonable. In this regard, then, the public interest does not favor one over the other.

Rolla argues that the public interest favors the expansion of municipal utility services into annexed areas and the minimization of duplicate facilities. But there are other aspects to the public interest. It is in the public interest to permit the existing relationship of Intercounty and its customers to continue undisturbed. Intercounty continues to serve other customers within the city limits of Rolla and there was no evidence presented that that situation is contrary to the public interest, or that it has raised critical aesthetic, economic or safety concerns. The record shows that, at best, only about a third of the respondents welcomed the prospect of service by RMU when a poll of the residents of the annexed area was taken. The public interest is not served by imposing a change of provider on these unwilling customers where such a change is not necessary.

It is also in the public interest that governmental bodies are seen to keep their promises. Having announced that Intercounty would continue to serve its existing customers, Rolla cannot now take a different position without breaking faith with the voters. RMU seems to be amply supplied with funds and there is no evidence suggesting that the lack of a franchise tax or PILOT, and the necessity of paying for street lighting in the annexed area, will be an insuperable burden. Likewise, the record does not show that the future growth of either Rolla or RMU will be unreasonably impeded if Intercounty keeps its existing customers in the annexed area.

For these reasons, therefore, the Commission determines that the forced sale sought by the City of Rolla is not in the public interest and should be denied.

What is the Fair and Reasonable Compensation to be Paid?

This is the second of the mandatory factors set out in Section 382.800.7 for consideration by the Commission. Because the Commission has determined that the forced sale proposed by Rolla is not in the public interest, it follows that there is no fair and reasonable compensation to be paid.

What is the Effect of the Forced Sale on System Operation?

This is the third of the mandatory factors set out in Section 382.800.7 for consideration by the Commission. The Commission has determined that the forced sale proposed by Rolla is not in the public interest. Thus, there is no transfer or acquisition whose effect must be considered. The effect of denying the forced sale proposed by Rolla is discussed elsewhere in this Report and Order.

It is clear on the record that, were the proposed forced sale ordered, the effect on both systems would be negligible. It is reasonable to infer, therefore, that the effect on both systems of not ordering the proposed forced sale is also negligible.

Other Issues as Agreed by the Parties:

This is the fourth of the mandatory factors set out in Section 382.800.7 for consideration by the Commission. The parties did not agree on any other issues to be determined. The parties litigated various issues relating to "the valuation formulas and factors contained in subsections 4, 5 and 6" of Section 386.800, such

as whether Rolla must buy Intercounty's office building in the annexed area; how to calculate depreciation given the general lack of evidence regarding the age of Intercounty's equipment in the annexed area; how to normalize Intercounty's revenues from the annexed area; whether or not to adjust the compensation to reflect the quality of Intercounty's easements in the annexed area; which of the parties should test Intercounty's equipment in the annexed area for contamination by PCBs; and the like. However, none of these points need be decided since the Commission has determined that the proposed forced sale is not in the public interest.

Assignment of Service Areas in the Annexed Area:

The Commission will assign service areas in the annexed area in conformance with the expectations created by Rolla's Plan of Intent and relied upon by the voters in approving the annexation. Intercounty shall retain all of its facilities in the annexed area and shall continue to serve all of the structures in the annexed area which it was serving on June 8, 1998. RMU shall serve any and all structures which first received service after June 8, 1998; that is, "new" structures.

The effect of this decision will be to create duplicate facilities. The record shows that RMU expected to be in this circumstance anyway and planned accordingly, because RMU did not make the decision to attempt to displace Intercounty from the annexed area until after the effective date of the annexation. Therefore, Rolla is getting the benefit of the bargain it originally sought in pursuing the annexation, except that it will not receive any franchise taxes, payments in lieu of taxes, or cost-free services from Intercounty.

The record shows that the solution adopted herein by the Commission raises aesthetic, economic and safety considerations. The safety concerns, to take the most important first, are minimized, and thus resolved, by the adherence of all parties to the National Electrical Safety Code. During the hearing, the Commission was repeatedly assured that all safety concerns were thereby resolved. The economic concern, namely, the inefficient duplication of plant, is largely unavoidable. Nevertheless, Rolla assured the Commission that it had expected and anticipated these costs from the beginning. Finally, the aesthetic concerns are subject to mitigation, through cooperation of RMU and Intercounty. Some facilities can be jointly used, rendering duplication unnecessary. New facilities can be installed underground. In any event, the cooperation of RMU and Intercounty can alleviate the safety, aesthetic and economic concerns. Now that the Commission has made its decision, the parties should cooperate to make the situation work best for all concerned.

IT IS THEREFORE ORDERED:

1. That Late-filed Exhibits 24 and 25 are received and made a part of the record of this matter.
2. That Intercounty Electric Cooperative's objection to lines 22:12 through 26:8 of Exhibit 4, the prepared Surrebuttal Testimony of Rodney Bourne, are overruled and the same are received into the record.
3. That the Application for Rehearing and Motion to Reconsider Order Regarding Motions to Compel and Motion to File Supplemental Rebuttal Testimony, filed on December 4, 2000, is denied.

4. That any pending motions not otherwise disposed of herein are denied.
5. That the forced acquisitions and transfers proposed by the City of Rolla in its application filed on October 29, 1999, are denied because the Commission has determined that they are not in the public interest.
6. That the service areas of Rolla Municipal Utilities and Intercounty Electric Cooperative in the annexed area are assigned as set out in this order, to wit: Intercounty Electric Cooperative shall continue to serve all structures in the annexed area which it was serving on June 8, 1998; Rolla Municipal Utilities shall serve all other structures in the annexed area, including any new structures built after June 8, 1998.
7. That this Report and Order shall become effective on March 25, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC.,
concur and certify compliance with the provisions of Section 536.080,
RSMo 2000.

**In the Matter of a Commission Inquiry into Purchased Gas Cost
Recovery.***

*Case No. GW-2001-398
Decided March 15, 2001*

Gas §§1, 17, 29. The Commission established this case to investigate the process for the recovery of natural gas commodity cost increases by local distribution companies from their customers. The Commission received applications to serve on the task force from numerous entities and individuals. The Commission allowed each entity to have one task force member, and each individual requesting to participate was also made a task force member.

**ORDER NAMING PARTICIPANTS OF THE
NATURAL GAS COMMODITY PRICE TASK FORCE**

On January 23, 2001, the Commission issued an order establishing this case to investigate the process for the recovery of natural gas commodity cost increases by local distribution companies (LDCs) from their customers. The order indicated that a Natural Gas Commodity Price Task Force would be created to investigate and discuss options on this issue. Applications to serve on the Task Force or otherwise participate in the case were to be filed no later than February 22, 2001.

*Please see page 547, Volume 9 MPSC 3d, for another order in this case. The Commission, in an order issued on April 9, 2001, named the following to the task force: Martha S. Hogerty, Office of the Public Counsel; Pat Childers, Atmos Energy Corporation; David Beier, Fidelity Natural Gas, Inc.; Michael Pendergast, Laclede Gas Company; and James M. Fischer, Southern Missouri Gas Company, L.P.

The Commission received applications to participate on the Task Force from numerous entities and individuals. The Commission finds that each of these entities or individuals shall be allowed to participate on the Task Force, resulting in a Task Force of 40 members. The Commission will appoint Warren T. Wood, P.E., Manager of the Commission's Gas Department, as the Chairman of the Task Force, with Thomas R. Schwarz, Jr., Deputy General Counsel of the Commission, as the Vice Chairman. David Sommerer, Manager of the Commission's Procurement Analysis Department, is also appointed as a Task Force member.

Although each entity, other than the Staff of the Missouri Public Service Commission, shall have only one Task Force member, the Commission notes that the meetings of the Task Force shall be public meetings and therefore open to the public. Those entities that have requested that more than one of their members be appointed to the Task Force will be directed to designate one person to represent the entity. The Chairman and the Vice Chairman of the Task Force shall have the authority to create subgroups within the Task Force and assign members to those subgroups. With the consent of the Chairman and the Vice Chairman of the Task Force, the entities may be allowed to have additional personnel participate in subgroups of the Task Force.

IT IS THEREFORE ORDERED:

1. That the following employees of the Missouri Public Service Commission are appointed to the Natural Gas Commodity Price Task Force:

- Warren T. Wood, P.E. – Chairman of the Task Force
- Thomas R. Schwarz, Jr. - Vice Chairman of the Task Force
- David Sommerer – Task Force member

2. That the entities listed below shall have one representative on the Natural Gas Commodity Price Task Force. As noted, each entity has specified one person to represent it on the Task Force.

- Bethany Municipal Gas System - Gary W. Wood, Superintendent
- City of Palmyra – Jim Browning, Mayor
- City Utilities of Springfield - Cathleen Meyer, Manager of Pricing
- Cooperating School Districts of Greater St. Louis - Bill Guinther
- County of Jackson - Jeremiah D. Finnegan, Special Counsel
- Gas Workers Union Local 56 – Joseph Schulte, Business Representative
- Kansas Pipeline Company – Chris Kaitson, General Counsel
- MC² Utility Consultants – Anne McGregor
- Mid America Assistance Coalition, Inc. – Jan Marcason
- Missouri Department of Natural Resources – Anita Randolph
- Missouri Gas Energy – Robert Hack, attorney
- Missouri Industrial Energy Consumers – Diana M. Vuylsteke, attorney
- Union Electric Company, d/b/a AmerenUE – Richard J. Kovach
- UtiliCorp United/Energy One - Robert J. Amdor

3. That the entities listed below shall have one representative on the Natural Gas Commodity Price Task Force. Each entity shall file a letter no later than March 26, 2001, nominating one person to represent it on the Task Force:

- Atmos Energy Corporation
- Fidelity Natural Gas, Inc.
- Laclede Gas Company
- Office of the Public Counsel
- Southern Missouri Gas Company, L.P.

4. That the following individuals are appointed to the Natural Gas Commodity Price Task Force:

- Susan Bisges
- Stuart W. Conrad
- Charles H. Day
- Mark Drazen
- Representative Rod Jetton
- Robert E. Kindle
- Charles D. Laderoute
- Joyce Lucas
- Mary K. Matalone
- Tim Maupin
- Representative Carol Jean Mays
- Patricia Ann Merritt
- Debbie Minor
- Amy Sheridan
- Senator Sarah Steelman
- Richard L. Taylor
- Vicki Walker
- Joyce White

5. That this order shall become effective on March 25, 2001.

Vicky Ruth, Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996.*

*Case No. TO-99-227
Decided March 15, 2001*

Telecommunications § 1. The Commission found that the M2A offered by Southwestern Bell Telephone Company met the requirements of 47 U.S.C. § 271(c).

Telecommunications § 1. The Commission found that any interconnection agreement adopted by a carrier and filed with the Commission with substantially the same terms and conditions as the M2A shall be deemed approved by the Commission when filed.

Telecommunications § 1. The Commission found that Southwestern Bell Telephone Company met the requirements in Missouri of the 14-point competitive checklist of 47 U.S.C. § (c)(2)(B).

Telecommunications § 1. The Commission found that Southwestern Bell Telephone Company's entry into the long distance market in Missouri is in the public interest.

Telecommunications § 1. The Commission supported Southwestern Bell Telephone Company's application for authority to provide in-region interLATA telecommunications service within Missouri.

Telecommunications § 46. The Commission found that any interconnection agreement adopted by a carrier and filed with the Commission with substantially the same terms and conditions as the M2A shall be deemed approved by the Commission when filed.

APPEARANCES

Paul G. Lane, General Attorney-Missouri, *Leo J. Bub*, Senior Counsel, *Katherine C. Swaller*, Attorney, and *Anthony K. Conroy*, Attorney, and *Mimi B. MacDonald*, Attorney, Southwestern Bell Telephone Company, One Bell Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

Christopher L. Rasmussen, Attorney, Southwestern Bell Long Distance, 5850 West Las Positas Boulevard, Room 300, Pleasanton, California 94588, for Southwestern Bell Communications Services, d/b/a Southwestern Bell Long Distance.

Michelle Sloane Bourianoff, Senior Attorney, AT&T Communications of the Southwest, Inc., 919 Congress Avenue, Suite 900, Austin, Texas 78701 2444, for AT&T Communications of the Southwest, Inc.

Kathleen M. LaValle, and *Patrick R. Cowlshaw*, Cohau, Simpson, Cowlshaw & Wulff, LLP, 350 North St. Paul, Suite 2700, Dallas, Texas 75201, for AT&T Communications of the Southwest, Inc., including its subsidiary TCG.

*Please see pages 69, 73, 117, 409, 429 and 432 for other orders in this case. In addition, see page 181, Volume 9 MPSC 3d, for another order in this case.

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Paul S. DeFord, Lathrop & Gage, 2345 Grand Boulevard, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

Mark W. Comley and *Robert K. Angstead*, Newman, Comley & Ruth, 601 Monroe Street, Suite 301, Jefferson City, Missouri 65101, for NEXTLINK Missouri, Inc., and Sho Me Competition, Inc.

Charles Brent Stewart, Stewart & Keevil, L.L.C., 1001 Cherry Street, Suite 302, Columbia, Missouri 65201, for ALLTEL Communications, Inc., Intermedia Communications, Inc., and City Utilities of Springfield, Missouri.

Lisa C. Creighton and *Mark P. Johnson*, Sonnenschein, Nath & Rosenthal, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111, for Birch Telecom of Missouri, Inc.

Patricia D. Perkins and *Richard S. Brownlee, III*, Hendren and Andrae, 221 Bolivar Street, Post Office Box 1069, Jefferson City, Missouri 65102, for Digital Teleport, Inc., Missouri Cable Telecommunications Association, and e.spire Communications, Inc.

Michael Ferry, Gateway Legal Services, Inc., 4232 Forest Park Avenue, Suite 1800, St. Louis, Missouri 63108, for Missouri Alliance of Area Agencies on Aging, Missouri Association for the Deaf, Missouri Council of the Blind, National Council of Silver Haired Legislatures, National Silver Haired Congress, Paraquad, and St. Louis Gateway Senior Network.

Carl J. Lumley, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for: Gabriel Communications of Missouri, Inc.; Association of Communications Enterprises; BroadSpan Communications, Inc.; d/b/a Primary Network Communications; MCI WorldCom Communications, Inc.; MCI WorldCom Network Services, Inc. (f/k/a MCI Telecommunications Corporation); MCImetro Access Transmission Services, Inc.; and Brooks Fiber Communications of Missouri, Inc.

Stephen F. Morris, Attorney, 701 Brazos, Suite 600, Austin, Texas 78701, for MCI Telecommunications Corporation, MCImetro Access Transmission Services, LLC, and Brooks Fiber Communications of Missouri (collectively, MCI WorldCom).

Lisa Cole Chase and *Matthew D. Turner*, Andereck, Evans, Milne, Peace & Johnson, 700 East Capitol Avenue, Post Office Box 1438, Jefferson City, Missouri 65102, for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., and Northeast Missouri Rural Telephone Company (the Midwest Independent Telephone Group, formerly known as the Mid Missouri Group).

Ronald Molteni, Assistant Attorney General, and *Mark E. Long*, Assistant Attorney General, Office of the Attorney General, Supreme Court Building, Post Office Box 899, Jefferson City, Missouri 65012, for the State of Missouri, acting through the Office of the Attorney General.

Kenneth A. Schiffman and *Rachel Lipman*, Sprint Communications Company, L.P., 8140 Ward Parkway, 5E, Kansas City, Missouri 64114, for Sprint Communications Company, L.P.

Stephen D. Minnis, Senior Attorney, Sprint, Local Telecommunications Division, 5454 West 110th Street, Overland Park, Kansas 66211, for Sprint Communications Company, L.P.

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James M. Fischer, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Associated Industries of Missouri.

Mary Ann (Garr) Young, *William D. Steinmeier*, P.C., 2031 Tower Drive, Post Office Box 104595, Jefferson City, Missouri 65110-4595, for: McLeodUSA Telecommunications Services, Inc.; Level 3 Communications, LLC; Allegiance Telecom of Missouri, Inc.; @Link Networks, Inc.; Bluestar Networks, Inc.; CCCMO, Inc., d/b/a Connect!; DSLnet Communications, LLC, MGC Communications, Inc., d/b/a Mpower Communications Corp.; New Edge Network, Inc.; Vectris Telecom, Inc.; and the Telecommunications Resellers Association.

Bradley R. Kruse, Associate General Counsel, McLeodUSA Telecommunications Services, Inc., 6400 C Street, SW, Post Office Box 3177, Cedar Rapids, Iowa 52406 3177, for McLeodUSA Telecommunications Services, Inc.

W.R. England, III and *Sondra B. Morgan*, Brydon, Swearingen & England, P.C., Post Office Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102-0456, for ALLTEL Missouri, Inc., BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

Howard Siegel, Attorney, IP Communications, 502 West 14th Street, Austin, Texas 78701, for IP Communications of the Southwest.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

David Stueven, Attorney at Law, 1512 Poplar Avenue, Kansas City, Missouri 64127, Consultant to Staff of the Missouri Public Service Commission.

Dana K. Joyce, General Counsel, *Penny G. Baker*, Deputy General Counsel, *Bruce H. Bates*, Assistant General Counsel, and *Nathan Williams*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior.

**ORDER REGARDING RECOMMENDATION ON 271 APPLICATION
PURSUANT TO TELECOMMUNICATIONS ACT OF 1996 AND
APPROVING THE MISSOURI INTERCONNECTION AGREEMENT (M2A)**

On November 20, 1998, Southwestern Bell Telephone Company (SWBT) notified the Missouri Public Service Commission (Commission) of its intent to file with the Federal Communications Commission (FCC) its application for authority to provide interLATA telecommunications services in Missouri under section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the Act). Section 271(d)(2)(B) of the Act provides that the FCC shall consult with the appropriate state commission before ruling on the application of any Bell operating company (BOC) to provide in-region, interLATA service. See, 47 U.S.C. § 271(d)(2)(B). In preparation for fulfilling its role under the federal statute, the Commission has held proceedings and received testimony and other evidence to determine if SWBT has complied with the requirements of the Act.

After extensive hearings and comments, the Commission finds that SWBT has satisfied the requirements of 47 U.S.C. § 271(c) for authority to provide interLATA services in Missouri and that SWBT's entry into the interLATA long-distance market in Missouri is in the public interest. Based on the extensive record in this case and the Commission's intention to expeditiously determine permanent rates for collocation, line sharing/line splitting, loop conditioning, and unbundled network elements, the Commission supports SWBT's application.

PROCEDURAL HISTORY

SWBT initiated this proceeding with its filing on November 20, 1998. Following full evidentiary hearings held between March 1 and March 10, 1999, the Commission issued an order directing the Missouri PSC Staff (Staff) to hire outside consultants to evaluate and verify the data underlying SWBT's performance measurements. After the conclusion of a request for proposal process, the Staff recommended that Ernst & Young perform a validation of SWBT's performance measures and verify that Telcordia's test of SWBT's five-state operations support systems (OSS) was sufficient to address anticipated commercial volumes of competitive local exchange carrier (CLEC) orders doing business in Missouri. SWBT's Hughes Aff. ¶ 14.

SWBT filed a Motion to Update the Record and for Approval of the Missouri 271 Interconnection Agreement on June 28, 2000, supported by detailed affidavits. Taking advantage of the extensive record developed by the Texas Public Utilities Commission in a similar proceeding, SWBT filed its proposed Missouri section 271 Interconnection Agreement (M2A), which is modeled after the Texas 271 Interconnection Agreement (T2A). *Id.* ¶¶ 4, 7. The T2A has been reviewed and approved by the Texas Public Utilities Commission and SWBT's application for interLATA authority in the state of Texas, including the prices, terms, and conditions of the T2A, has been approved by the FCC.

The M2A as originally filed generally follows the substantive terms of the T2A, but also incorporated this Commission's arbitration decisions as well as other

modifications described in the affidavits accompanying SWBT's draft application. See, *id.* ¶ 7. The M2A provided terms for interconnection, access to unbundled network elements (UNEs) (including combined UNEs not currently combined in SWBT's network), and resale. *Id.* ¶¶ 7, 8. The M2A is effective for one year after this Commission's approval as meeting the 14-point competitive checklist;¹ upon FCC approval of SWBT's 271 Application in Missouri, the terms of the M2A may be extended for an additional three years. *Id.*; SWBT's Sparks Aff. ¶ 25.

Following responses by intervening parties, SWBT filed supporting reply affidavits on September 20, 2000. The Commission then conducted extensive on-the-record question and answer sessions on October 11-12, 2000, and then again on November 8-9, 2000. The Commission gave each CLEC that chose to participate every opportunity to raise any issue in response to SWBT's request for authority to provide interLATA long-distance services in Missouri. On November 20, 2000, SWBT filed an updated M2A that incorporated numerous revisions to which SWBT had agreed in the course of the proceedings in this case. The intervening parties filed responses to the question and answer sessions and to the updated M2A. At the direction of the Commission, the parties also filed summaries of their evidence and position statements. On January 31, 2001, the Commission held a final on the record conference with the parties.

On January 30, 2001, the parties met with Ernst & Young in a technical conference to discuss their evaluation. Reports regarding that conference were filed on February 13, 2001. Also on February 13, 2001, the Commission issued an Interim Order in which it explained its current position and indicated areas in which it found that SWBT was not yet in compliance with section 271(2)(B) of the Act. Following that order, SWBT filed another revised M2A and the parties filed responses and requests for reconsideration.

Final revisions to the M2A were filed by SWBT on February 28, 2001. Staff filed a response on March 1, 2001, stating its opinion that, with the final revisions, SWBT's revised M2A was fully compliant with the Interim Order.

STATUTORY FRAMEWORK

In the Act, BOC provision of in region, interLATA service is conditioned on compliance with the provisions of section 271. Pursuant to section 271, BOCs must apply to the FCC for authorization to provide interLATA services in each state within the BOCs region. With respect to each state within the region, the BOC must show

that: (1) it satisfies the requirements of either section 271(c)(1)(A), known as "Track A" or 271(c)(1)(B), known as "Track B"; (2) it has "fully implemented the competitive checklist" or that the statements approved by the state under section 252 satisfy the competitive checklist contained in section 271 (c)(2)(B); (3) the requested authorization will be car-

¹ The Commission issued an order on March 6, 2001, finding that SWBT had complied with the 14-point checklist and indicating support for SWBT's application to the FCC.

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ried out in accordance with the requirements of section 272; and (4) the BOC's entry into in-region, interLATA market is "consistent with the public interest, convenience, and necessity."²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

I. PRELIMINARY ISSUES

A. FINDINGS OF FACT

SWBT submitted its first draft section 271 application in November 1998. Based upon the record developed through evidentiary hearings conducted by this Commission in March 1999 and the whole of a similar Section 271 proceeding in the state of Texas, the Commission Staff recommended that Ernst & Young perform a validation of SWBT's performance measures and verify that Telcordia's test of SWBT's five-state OSS is sufficient to address anticipated commercial volumes of Missouri-CLEC orders. SWBT's Hughes Aff. ¶ 14.

The operations, systems, and procedures employed by SWBT are managed on a region wide basis. That region includes Missouri, Texas, Oklahoma, Kansas and Arkansas. The Public Utility Commission of Texas (Texas Commission) has performed a substantial review in collaboration with SWBT and CLECs.

SWBT made use of the Texas Commission's extensive review by filing with this Commission, on June 28, 2000, the Missouri 271 Agreement (M2A), which is modeled after the Texas 271 Agreement (T2A). *Id.* ¶¶ 4, 7. The M2A generally follows the substantive terms of the T2A but incorporates arbitration decisions of this Commission, as well as other modifications. *See id.* ¶ 7. The M2A was subsequently revised and resubmitted on November 20, 2000, and February 16, 2001. Final revisions to the M2A were submitted on February 28, 2001.

The M2A provides binding terms for interconnection, access to unbundled network elements (UNEs) (including combined UNEs not currently combined in SWBT's network), and resale. *Id.* ¶¶ 7, 8. The M2A is effective for one year after this Commission's order finding compliance with section 271(c). After FCC approval of SWBT's 271 Application in Missouri, the terms of the M2A may be extended for an additional three years. *Id.*; SWBT's Sparks Aff. ¶ 25.

² *Memorandum Opinion and Order, In re: Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, FCC Docket No. 00-217, (rel. Jan. 22, 2001), ¶ 8.

B. CONCLUSIONS OF LAW

The Commission has conducted these proceedings and reviewed SWBT's Application to provide in-region, interLATA telecommunications services in Missouri in order to fulfill its role under federal law to consult with the FCC pursuant to section 271(d)(2)(B). The Commission has carefully reviewed all of the evidence presented to it in this proceeding, including the testimony provided at the on-the-record question and answer sessions concluded in November 2000 and the on-the-record conference held on January 31, 2001. In addition, the Commission has considered the additional comments, testimony, and evidence provided up to the issuance of this order. The Commission has also taken notice of the FCC's review and findings in the *Texas Order*.³ Because the operations, systems, and procedures employed by SWBT are managed on a region-wide basis, the conclusions reached with respect to SWBT's 271 application in Texas are relevant to Missouri.

II. THE MISSOURI 271 AGREEMENT**A. FINDINGS OF FACT**

To ensure that CLECs have easy access to a contract incorporating SWBT's various section 271 commitments, SWBT has proposed the M2A, a comprehensive contract relating to all aspects of SWBT's wholesale operations in Missouri.⁴ The T2A, on which the M2A is modeled, was created out of an extensive and thorough collaborative process. See *generally* SWBT's Shelley Aff. (Attachment A to SWBT's Hughes Aff.). The Texas Commission approved the T2A on October 13, 1999.⁵ Many of the same CLECs that were parties to the Texas negotiations are parties to this proceeding and are providing similar local telephone service in Missouri.

There are differences between the M2A and the T2A. See *generally*, SWBT's Joint Sparks, Hughes, Dysart, Rogers Aff. (SWBT's Joint Aff.) and Attachs. A (matrix presenting differences between T2A and M2A) and B (presenting pricing differences between T2A and revised M2A). See *also*, SWBT's responses filed February 16, 2001, and February 28, 2001. A major difference is that the prices of UNEs, interconnection, and resale in the M2A reflect Missouri specific rates where Missouri-specific cost studies have been undertaken, rather than the rates applicable in Texas. See, SWBT's Hughes Aff. Some of the prices in the M2A are interim and subject to true up. See, Hughes Reply Aff. ¶ 3.

Unlike the T2A, the optional amendments available with the M2A address specific FCC requirements that were not in place at the time of the Texas filing. For

³ *Memorandum Opinion and Order, Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 (rel. June 30, 2000) ("Texas Order").

⁴ See M2A § 4.1.1.

⁵ Order No. 55 Approving the Texas 271 Agreement, *Investigation of SWBT Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Project No. 16251

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example, there are certain unbundling obligations in the *UNE Remand Order*⁶ that became effective on May 17, 2000, after the Texas application had been filed.⁷ Similarly, the FCC's recent *Line Sharing Order*,⁸ which became effective on June 6, 2000, requires that SWBT show that it has implemented the loop facility and OSS modifications necessary to accommodate the unbundling of the high-frequency portion of the loop. The optional amendments available with the M2A reflect SWBT's compliance with these new requirements. See, SWBT's Sparks Aff. ¶¶ 75-82.

The M2A offers CLECs access to dark fiber, sub loop unbundling, local switching, tandem switching, signaling networks, call related databases, line conditioning, and information on loop qualification. See, *id.* ¶¶ 79-82. The M2A further provides CLECs a means to obtain any additional UNEs required by the FCC or identified through arbitration. See, *id.* ¶ 74; M2A Attach. 6 – UNE § 14.5.

SWBT has also made changes to the M2A to incorporate the latest performance measures and business rules as adopted in the state of Texas. See, SWBT's Joint Aff. ¶¶ 30-43; SWBT's Dysart Reply Aff. ¶¶ 11-18. These also include changes in performance measure provisions attributable to different state entities and regulation in Missouri, as well as Missouri specific damage adjustments and assessment level adjustments. See, *id.* ¶ 30.

The FCC approved Version 1.6 of the performance measurements in the *Texas Order*, and SWBT has gathered and reported data to this Commission under Version 1.6. But in July 2000, at the end of a six-month collaborative review of the performance measurements, including multiple workshops with AT&T, WorldCom, Sprint, other CLECs, and SWBT, the Texas Commission directed that the performance measurement plan be modified by eliminating 30 measures, adding 17 new ones, and modifying an additional 84.⁹ The revised set of performance measures is known as Version 1.7 of the business rules. Notably, Version 1.7 also serves as the basis for the performance remedy plans that the Oklahoma Corporation Commission (OCC) and the Kansas Corporation Commission (KCC) have approved.

SWBT also provides for some services in the M2A beyond what it is legally obligated to provide. For example, the M2A requires SWBT to combine certain

⁶ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

⁷ See *id.* at 3926, ¶ 526. The requirements that were not contained in 47 C.F.R. § 51.319 prior to the rule being vacated by the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), became effective 120 days after publication in the Federal Register. The new unbundling requirements include SWBT's obligation to offer unbundled access to its dark fiber, sub-loops and inside wire, packet switching, dark fiber transport, calling name and 911 databases, and loop qualification information. 15 FCC Rcd at 3926, ¶ 527 n.1040.

⁸ See Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"); SWBT's Sparks Aff. ¶¶ 84-96.

⁹ Order No. 13, *Section 271 Compliance Monitoring of SWBT Telephone Company of Texas*, Project No. 20400 (Tex. PUC July __, 2000), and Order No. 15, *Implementation of Docket Nos. 20226 and 20272*, Project No. 22165 (Tex. PUC July 19, 2000).

UNEs that are not already combined in its network.¹⁰ SWBT has agreed, therefore, to provide CLECs new loop-to-switch platform combinations,¹¹ as well as new combinations of loop and transport facilities known as the Enhanced Extended Loop (EEL).¹²

SWBT has also agreed to a number of additional modifications to the M2A. For example, in response to Staff's concerns, SWBT has removed language providing that the performance measurements plan is the sole and exclusive remedy for failure to meet applicable standards and benchmarks. This change includes a minimum annual cap on liability which is equivalent to the Texas performance measurements plan. SWBT has also modified its proposed penalties for failure to file performance reports on time or filing incomplete reports. See, SWBT's Dysart Reply Aff. ¶ 29; SWBT's Oct. 26 Comments at 2-3.

SWBT has stated that it will interpret the M2A language relating to the use of SWBT's network in the provision of intraLATA toll by third parties and the party responsible for terminating compensation, in the same manner as comparable T2A language has been interpreted in the Sage arbitration. See, SWBT's Oct. 26 Comments at 42. SWBT has also agreed, through its negotiations with Birch, to make operational changes in the event DSL was previously provisioned on any multi line hunt groups. This change and interpretation will apply equally to all CLECs. *Id.*

SWBT has also proposed specific amendments to the M2A based on questions raised by the Commission. Those revisions were included in the revised M2A filed on November 20, 2000. The revisions included posting the aggregate performance results for both Version 1.6 and Version 1.7 of the Business Rules, providing for changes to comply with intervening law, and permitting CLECs to seek an expedited dispute resolution with Staff serving the role of mediator. Changes were also made to clarify the nonrecurring charges for certain UNE combinations. SWBT's Post Oct. Hearing Comments at 4-5.

SWBT has made other changes in order to comply with the Commission's Interim Order issued on February 13, 2001. Those changes include:

A. General Terms and Conditions: The revised M2A eliminates Section 3 pertaining to deposits and revises Section 10.7 to eliminate the reference to Section 3 and insert the provision from the T2A concerning deposits after initiation of disconnect procedures. In addition, the revised M2A contains some "clean up" provisions, including the listing in the Table of Contents of (1) the Appendix Pricing-UNE: Exhibit 1 and (2) Version 1.7 of the Performance Measurement Business Rules, as well as the renumbering of misnumbered paragraphs in Sections 2, 4, 7 and 8, and the correction of misspelled words in Sections 9, 18 and 54.

¹⁰ See, SWBT's Sparks Aff. ¶ 88; see also, T2A Attach.- 6 - UNE §§ 14.2, 14.7. In the *Texas Order*, the FCC clarified that, for combinations that did not pre-exist, incumbent local exchange carriers ("ILECs") had an obligation to provide CLECs access to UNEs only in a manner that enables CLECs to combine those elements. See, *Texas Order* ¶¶ 216-218.

¹¹ See, SWBT's Sparks Aff. ¶ 89; M2A Attach. 6 - UNE §§ 14.2-14.4.

¹² See, Sparks Aff. ¶ 89; M2A Attach. 6 - UNE § 14.7.

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B. Appendix Pricing-UNE: Schedule of Prices: There are a number of changes to this Appendix including: (1) the reduction of certain nonrecurring charges (NRCs) by up to 25 percent, but not to a level below the corresponding NRCs in the Texas 271 Agreement (T2A); (2) listing of Texas rates on an interim, subject to true up basis for the 95¹³ rates identified as not having been previously reviewed by the Commission;¹⁴ (3) revisions to reflect that the rates previously established in Case No. TO-98-115 should be interim, subject to true up; and (4) "clean up" revisions to the notes to reflect the proper sources of rates (e.g., SS7 transport per message, STP Port per port, and DS3 dedicated transport cross connects were revised to reflect that these rates are pursuant to the Commission's July 31, 1997, Order in Case No. TO-97-40).

C. Attachment 13 - Appendix: Physical Collocation: This appendix was revised to state that it will be in effect only until the effective date of an order approving a physical collocation tariff in Case No. TT-2001-298 or other appropriate case established by the Commission. This appendix has also been revised to utilize Texas rates and rate elements¹⁵ on an interim, subject to true-up basis as set forth in Sections 20 and 21. In addition, certain clean-up revisions have been made (e.g., removal of citations to Texas central offices in Section 6.1.3(c), correction of a misspelled word in Section 6.6.6 and substitution of the word "tariff" for the word "appendix."

D. Attachment 13 - Appendix: Virtual Collocation: Changes similar to those in Attachment 13 - Appendix: Physical Collocation have also been made in this appendix. Section 13.0 provides the rates shall be interim, subject to true up. References to Kansas were changed to Missouri in Sections 2.0, 5.2, 11.0, 15.2, 15.3 and 16.1. Section 17.0 provides that the rates are interim, subject to true up. The rates in Section 17.3 reflect Texas rates.

E. Attachment 25: DSL: This attachment has been revised to reflect that conditioning rates from Texas are to be utilized on an interim, subject to true up basis to the rates established in Case No. TO-2000-322, Case No. TO-2001-439 or other appropriate case established by the Commission as set forth in Section 11.4.

F. Line Sharing: Optional Line Sharing Amendment-Appendix to Attachment 25: xDSL: Pursuant to the February 13 Order, SWBT has attached a redlined version of the Texas line sharing amendment which has been modified for application in Missouri. Under the M2A, this optional amendment is available on an interim, subject to true up basis as set forth in Section 10.1.

G. Line Splitting: The Optional Line Splitting Amendment-Appendix to Attachment 25: xDSL: This revision provides that SWBT will make available in

¹³ See, February 13 Order, pp. 5-6.

¹⁴ SWBT included Springfield as Zone 1 for pricing purposes for transport mileage and termination for voice grade, OC3 and OC12 interoffice transport and OC3 and OC12 entrance facilities.

¹⁵ Use of Texas rate elements and rates complies with the requirements of the February 13, 2001, Order. SWBT has proposed alternative rate elements and rates in Case No. TT-2001-298.

Missouri the prices, terms, and conditions of the Texas line splitting arbitration, once final, on an interim, subject to true-up basis to the permanent prices, terms, and conditions to be set by the Commission in Case No. TO-2001-440 or other appropriate docket. As SWBT made clear at the January 31, 2001, on-the-record proceeding, it reserves the right to contend, in Case No. TO-2001-440 that line splitting as contemplated in the Texas arbitration should not be required in the M2A. T. 3240-41.

SWBT made final revisions to the M2A on February 28, 2001. Those revisions clarified the true-up process contemplated by the Commission in its Interim Order and corrects an error in the UNE pricing schedules. See *generally*, Response of SWBT to the Staff Report, Feb. 28, 2001.

B. CONCLUSIONS OF LAW

Three state commissions, Texas, Kansas, and Oklahoma, have each approved model interconnection agreements in their states. While Congress may not have explicitly contemplated the M2A when enacting the 1996 Act, there is nothing in state or federal law that prevents this Commission from reviewing the M2A for compliance with section 271(c). Moreover, by approving the M2A, this Commission can transform the terms of the M2A into “concrete and specific legal obligation[s]” to furnish checklist items and thereby demonstrate that SWBT “is ready to furnish, the checklist item[s].” *Texas Order* ¶ 21.

The fact that the M2A contains interim rates is no barrier to our approval. The FCC has made clear that “the mere presence of interim rates will not generally threaten a section 271 application so long as an interim solution to a particular rate dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set.” *Texas Order* ¶ 88 (approving SWBT’s Texas application despite interim rates for interconnection).¹⁶ The Commission finds that the M2A reflects a reasonable effort under the circumstances to set interim rates “in accordance with the Act and the FCC’s rules.” *Id.* ¶ 89.

The interim solution is reasonable because the rates are cost-based, this Commission has initiated cost proceedings that will be completed expeditiously in Case Nos. TO-2001-438, TO-2001-439, TO-2001-440, and TT-2001-298, and SWBT has agreed to abide by the Staff’s true up mechanism. See, *id.* ¶¶ 89-90.

Although SWBT no longer offers operator services and directory assistance as unbundled network elements, it does offer these services to CLECs on a nondiscriminatory basis at market-based prices. SWBT’s Joint Aff. ¶¶ 47-48; *UNE Remand Order*, 15 FCC Rcd at 3906, ¶ 473.

Version 1.7 of SWBT’s performance remedy plan represents the latest and most accurate set of performance measurements developed. See, SWBT’s

¹⁶ See also Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4090-91, ¶ 258 (1999) (“*New York Order*”).

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Dysart Reply Aff. ¶¶ 11-18 and Attach. C. No commenter disputes that Version 1.7 represents a preferable set of performance measurements for implementation with the M2A. The Commission concludes, therefore, that Version 1.7 should be implemented as part of the M2A.¹⁷

The Commission finds that the M2A does not discriminate against a telecommunications carrier that is not a party to the agreement and that the implementation of the M2A is not inconsistent with the public interest, convenience, and necessity. CLECs may file with this Commission any interconnection agreement that is substantively identical to the M2A and the interconnection agreement will be considered approved when filed.

Notwithstanding our approval of the M2A, nothing precludes a CLEC from negotiating an alternative agreement outside of the terms and conditions of the approved model. In such circumstances, SWBT would be bound to offer the CLEC such terms and conditions in compliance with the relevant requirements under sections 251 and 252.¹⁸

III. FACILITIES-BASED COMPETITION IN MISSOURI — TRACK A

A. FINDINGS OF FACT

Several Missouri CLECs provide facilities-based service to both business and residential customers in Missouri. WorldCom, for example, provides service over its own facilities to many thousands of Missouri business and residential customers. See, SWBT's Tebeau Aff. ¶ 42. AT&T also provides facilities-based service to business subscribers, along with some service to residential customers. *Id.* ¶ 40. Both of these carriers operate pursuant to an approved interconnection agreement. *Id.* ¶¶ 40, 42.

SWBT estimates that CLECs serve approximately 13 percent of access lines in SWBT's Missouri serving area. A few carriers contend that SWBT overstates the amount of local competition in Missouri. Response of McLeodUSA to Question and Answer Session of October 11-12, 2000; and Comments to Interim Contract Report of Ernst & Young at 17; T. 2296-2297 (AT&T's Turner). Based on data collected from CLECs, Staff estimates that CLECs serve approximately 12 percent of access lines in SWBT territory. Staff's Voight Aff. ¶¶ 15-24; T. 3097-98 (Staff's Voight).

Although there is a disagreement among the parties as to the exact number of access lines served, the Commission finds that the Staff's estimates based on data collected from Missouri CLECs is consistent with SWBT's estimates, and therefore, the Commission finds that CLECs serve approximately 12 percent of access lines in SWBT territory.

¹⁷ The FCC has cautioned, however, that "adoption by a state of a particular performance standard pursuant to its state regulatory authority is not determinative of what is necessary to establish checklist compliance under section 271." *Texas Order* ¶ 55.

¹⁸ The Commission notes that, consistent with the T2A, the M2A allows CLECs in Missouri to elect under 47 U.S.C. § 252(i) to pick and choose portions of the M2A. Attachment 26 of the M2A explains what sections in the M2A are "legitimately related" to others for purposes of allowing a CLEC to obtain access to any individual interconnection, service, or network element arrangement under the M2A.

B. CONCLUSIONS OF LAW

“Track A” of section 271 requires SWBT to demonstrate that it has entered into interconnection agreements with at least one carrier that qualifies as a “competing provider of telephone exchange service” that is providing service “to residential and business subscribers” either “exclusively over [its] own . . . facilities or predominantly over [its] own . . . facilities in combination with the resale.” 47 U.S.C. § 271(c)(1)(A). For purposes of Track A, a carrier that provides service over UNEs leased from SWBT is providing service over its “own facilities.” See, *Michigan Order*,¹⁹ 12 FCC Rcd at 20594, ¶ 94.

The Attorney General contends that the M2A cannot be used to satisfy Track A. See, State of Missouri Post Oct. Hearing Comments at 3. AT&T and WorldCom are “Track A” carriers insofar as they provide facilities-based service to business and residential customers. Because these carriers each have their own approved interconnection agreements with SWBT, the Commission does not need to address the Attorney General’s argument that the M2A cannot be used to satisfy Track A.

Because the FCC has concluded “that a new entrant” need not “serve a specific market share” to qualify as a Track A carrier, *id.* at 20585, ¶ 77, there is also no need for the Commission to resolve the dispute regarding the accuracy of SWBT’s estimates of the extent of local competition in Missouri.

IV. THE COMPETITIVE CHECKLIST – SECTION 271(B)

A. FINDINGS OF FACT

(1) Checklist Item 1: Interconnection

Section 251(c)(2) requires SWBT to provide requesting carriers interconnection to SWBT’s network at any technically feasible point, at least equal in quality to that provided by SWBT to itself, and on nondiscriminatory rates, terms, and conditions. 47 U.S.C. § 251(c)(2); *Texas Order* ¶ 61.

The M2A together with Commission-approved interconnection agreements establish several methods of interconnection for requesting carriers. See, SWBT’s Deere Aff. ¶ 13; M2A Attach. 11 – Network Inter-connection Architecture; M2A Attach. 11 – App. Network Interconnection Methods § 2.0. Each of these interconnection arrangements is available at the line side or trunk side of the local switch, the trunk connection points of a tandem switch, central office cross-connect points, out-of-band signaling transfer points, and points of access to UNEs. See, SWBT’s Deere Aff. ¶¶ 19-20. SWBT also offers interconnection at any single, technically feasible point within a LATA in compliance with paragraph 78 of the *Texas Order*. See, SWBT’s Sparks Reply Aff. ¶¶ 28-29. In addition to these standard offerings, CLECs may request custom-tailored interconnection arrangements through a Special Request process, which allows CLECs to request modifications to existing interconnection arrangements as well as additional arrangements. See, SWBT’s Deere Aff. ¶¶ 28, 77-81; SWBT’s Sparks Aff. ¶ 57; M2A Attach. 6 – UNE § 2.22.

¹⁹ Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543 (1997) (“Michigan Order”).

Interconnection Trunking

AT&T claims that there is “at least a potential inconsistency between SWBT’s reported data for average interconnection trunk installation interval (PM 78) and its data for percent missed due dates (PM 73).” AT&T’s Fettig Test. at 27. Data reported in PM 73 capture the number of all trunks provisioned. On the other hand, data captured in PM 78 capture all trunk orders that have a due date within the standard interval (20 days) and were not a customer-caused miss. See, SWBT’s Dysart Reply Aff. ¶¶ 38-40 (providing table reconciling data reported under PM 73 with those reported under PM 78). Thus, the two measures accurately capture the data they were designed to report.

SWBT’s performance under PM 73 shows that it has provided Missouri CLECs parity or better trunk installation in 11 of the 12 months preceding November 2000, thus demonstrating nondiscriminatory service. SWBT’s Dysart Post Nov. Hearing Aff. ¶ 32. SWBT has met or exceeded the one percent benchmark for PM 70 (Percent Trunk Blockage) in each of the 12 months preceding November 2000, and has met or exceeded the benchmark for PM 71 (Common Transport Trunk Blockage (Percent of Trunk Groups with > 2 Percent Blockage)) in 11 of the 12 months preceding November 2000. *Id.* ¶ 34. SWBT thus has provided Missouri CLECs a meaningful opportunity to compete.

AT&T seeks to measure SWBT’s performance under a standard for PM 73 that neither was in effect for the relevant period nor is required by the FCC for section 271 approval. In this respect, AT&T claims that SWBT’s performance for timely trunk provisioning would have been deficient in some of the 12 months preceding November 2000 if measured under a new benchmark standard of 95 percent for PM 73 (Percentage of Missed Due Dates – Interconnection Trunks), which was instituted in Texas (but not Missouri) on August 1, 2000, as Version 1.7 of SWBT’s performance measurements. See, AT&T’s Fettig Test. at 29; AT&T’s Post Oct. Hearing Comments at 6-8. As AT&T recognizes, SWBT has met the parity standard that was in force for PM 73 “in most of these months.” AT&T’s Fettig Test. at 29 ; See *also*, AT&T’s Post Oct. Hearing Comments at 6; T. 2945 (AT&T’s Cowlshaw).

AT&T also suggests that it is unclear whether SWBT’s trunk blockage measure (PM 70) accurately reflects CLEC experience. See, AT&T’s Fettig Test. at 31. The Texas Commission’s *Performance Measurements Modifications Order* (which established Version 1.7 of SWBT’s performance measurements, effective August 1, 2000) directs that PM 70 (Percentage of Trunk Blockage) be modified to encompass 20 days of data for each month, excluding weekends and holidays. AT&T claims that SWBT’s reporting under the “official study week” approach reflected in the current Version of PM 70 may not be representative of the blockage CLECs experienced throughout the month.

The Commission’s adoption of Version 1.7 should not materially alter SWBT’s results reported under the current Version of PM 70, which reflects long-accepted industry practice. See, SWBT’s Dysart Reply Aff. ¶ 46. SWBT’s aggregate performance effectively met or exceeded the one percent benchmark for PM 70 for all Missouri CLECs in each of the 12 months preceding November 2000. SWBT’s Dysart Post Nov. Hearing Aff. ¶ 34.

AT&T claims that SWBT has reported excessive blocking to TCG in the St. Louis market under PM 70 in June and July 2000. AT&T's Fettig Test. (Perf. Meas.) at 30. SWBT determined that out-of-service trunks caused blocking on a few TCG trunk groups in St. Louis during those two months, and those problems have now been fully corrected. SWBT's Dysart Reply Aff. ¶ 44.²⁰

AT&T questions SWBT's policies regarding the FCC's requirement that a CLEC "ha[ve] the option to interconnect at only one technically feasible point in each LATA." *Texas Order* ¶ 78. See, AT&T's Comments at 19-32; AT&T's Post Oct. Hearing Comments at 8-13; See also, Gabriel's Cadieux Aff. at 25-32. In light of paragraph 78 of the *Texas Order*, SWBT added to the M2A the option for a CLEC to interconnect at a single, technically feasible point within the LATA, tailored to meet the CLEC's need. See, SWBT's Sparks Reply Aff. ¶¶ 28-29. The relevant language of the additional clause was based upon that which the FCC approved in the *Texas Order* (¶ 78 n. 174), and was also similar to that approved by both the KCC and OCC. See, T. 3003 (SWBT's Sparks). Based on further discussions with Staff, Gabriel and other CLECs, SWBT modified this proposed language (by adding revisions proposed by Gabriel) in order to alleviate any CLEC concerns about their ability to interconnect at a single, technically feasible point. As Staff testified at the November 9, 2000 question and answer session, this offering with the revised language, which has now been incorporated into the M2A,²¹ meets checklist item (i). See, T. 3015-16 (Staff's Voight). Gabriel concurred, stating that with its proposal incorporated "we believe there's no longer an issue" with the single point of interconnection ("POI"). T. 2994 (Gabriel's Cadieux). McLeodUSA stated that it was "fine" with the language, T. 3018 (McLeodUSA's Kruse), and NEXTLINK said that it "concurs," T. 3018 (NextLink's Pomponio). See generally, SWBT's Post Nov. Hearing Br. at 29-31.

Only AT&T raises a further concern. In AT&T's example, the calling and called parties are located in the same local calling area, but the single point of interconnection is in another exchange in the same LATA, which could be hundreds of miles away. See Staff's Voight Post Oct. Hearing Aff., Sched. I 4 (attached to Staff's Post Oct. Hearing Comments). On such calls, AT&T proposes to pay SWBT only the

²⁰ Discussed at the November 8-9, 2000, hearing was the extent to which SWBT continues to record as a "miss" under PM 74 (Average Delay Days for Missed Due Dates - interconnection Trunks) the days after SWBT is prepared to complete an order, but the CLEC is unprepared to accept it. SWBT's Dysart Post Nov. Hearing Aff. ¶ 36. SWBT explains that, if the CLEC is unprepared to accept the completion on the due date, delay days thereafter are excluded from the results for PM 74, as permitted by the "Customer Caused Misses" exclusion stated in the business rules (for purposes of PM 73, the missed due date is not recorded as a miss, in accordance with the same exclusion). *Id.* However, if SWBT is unprepared to complete the order on the due date, but becomes ready thereafter, the days following that point of readiness through the date of actual completion and CLEC acceptance have not been excluded from the data for PM 74 (*i.e.*, they have been charged to SWBT as "delay days"). *Id.* In light of the exclusion to which it is entitled, these days should not be charged as SWBT-caused delay days, and SWBT states that it is attempting to modify its Work Force Administration system to correctly capture this information in the future. *Id.*

²¹ Attachment 11: Network Interconnection Architecture, paras. 1.1 – 1.3.

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reciprocal compensation rate even though SWBT would be required to back-haul the traffic to and from AT&T's distant single point of interconnection. See, AT&T's Post Oct. Hearing Comments at 9-10, 13, 15; T. 3005-07 (AT&T's Turner). SWBT argues that a CLEC should be responsible for paying the cost of transporting the call between SWBT's end office and the point of interconnection in the other local exchange.

Collocation

SWBT makes available caged, shared cage, and cageless physical collocation, all at the option of the CLEC. See, SWBT's Sparks Aff. ¶¶ 46-54. SWBT also makes available adjacent collocation and virtual collocation and will make available any other physical collocation arrangement that has been deemed technically feasible on another incumbent LEC's premises, unless such an arrangement is not technically feasible on SWBT's premises or there is a lack of space. See, *id.* ¶¶ 55, 57, 70; SWBT's Deere Aff. ¶ 22.

The available monthly performance data show that SWBT routinely processes CLECs' requests for collocation within the applicable interval (PM 109). See, SWBT's Dysart Aff. ¶ 44; SWBT's Dysart Reply Aff. Attach. A.; SWBT's Dysart Post Nov. Hearing Aff. Attach. A. For example, SWBT successfully processed, designed, developed quotes, and responded within specified timelines for 97.3 percent (476) of the 489 Missouri CLECs' applications for collocation facilities submitted over the 11 month period ending in April 2000. SWBT's Dysart Aff. ¶ 44. SWBT likewise regularly meets its due dates for installation of collocation within the applicable benchmark (PM 107). See, *id.*; SWBT's Dysart Reply Aff. Attach. A; SWBT's Dysart Post Nov. Hearing Aff. Attach. A.

When SWBT first filed its M2A on June 28, 2000, SWBT included appendices that set forth the standard terms and conditions upon which it would offer physical and virtual collocation arrangements to CLECs in Missouri, once the M2A was approved. These appendices also included statewide average rates for collocation arrangements. See, T. 2823 (SWBT's Hughes).

At the question and answer session on October 11-12, 2000, SWBT committed to the Commission that it would file a proposed tariff under which SWBT would offer collocation to CLECs in Missouri. On October 24, 2000, SWBT filed proposed collocation tariffs in the Commission's Case No. TT-2001-298. These tariffs contain standard terms and conditions applicable to SWBT's provision of collocation to CLECs in Missouri that are different from the terms and conditions contained in the original collocation appendices to the M2A. SWBT alleges these tariffs contain statewide average prices for physical and virtual collocation using the TELRIC methodology. See, T. 2823 (SWBT's Hughes). However, the Commission has suspended the collocation tariffs and established a procedural schedule including evidentiary hearings to determine the appropriate collocation prices, terms, and conditions.

In the meantime, SWBT made revisions to the M2A to include on an interim basis, the collocation terms and conditions identical to the terms and conditions in SWBT's collocation tariff in the state of Kansas, and the prices identical to the Texas collocation tariff based on the TELRIC methodology. See, Staff Report on

Compliance with the Commission Interim Order, filed Feb. 23, 2001, p. 4. These prices are subject to a limited true up once permanent rates based on Missouri costs are established in Case No. TT-2001-298. See, T. 3026-27 (SWBT's Hughes); See also, Staff Report on Compliance with Commission Interim Order Regarding the Missouri Interconnection Agreement, pp. 3-4; and See, M2A, Attach. 6 – App. Pricing – UNE.

The FCC has approved interim prices in Texas where that state commission had a schedule in place for setting permanent prices. The FCC has also approved a Kansas agreement that is similar to the Texas agreement with a few modifications to the terms and conditions. In addition, the CLECs and SWBT have been operating under the Texas prices in that state for a substantial period of time. In order to move competition forward, the Commission finds that until permanent collocation prices are set in Missouri by a final decision in Case No. TT-2001-298, it is appropriate to use the Texas prices subject to a limited true-up period. Furthermore, during the Commission's question and answer session on November 8, 2000, none of the parties indicated that they would object to Texas collocation prices with the terms and conditions of the Kansas agreement.

(2) Checklist Item 2: Nondiscriminatory Access to Network Elements

Access to UNEs Generally

The M2A offers CLECs access to dark fiber, sub-loop unbundling, local switching, tandem switching, signaling networks, call-related databases, line conditioning, and information on loop qualification. SWBT's Sparks Aff. ¶¶ 79-82. The M2A also provides CLECs a means to obtain any additional UNEs required by the FCC or identified through arbitration. *Id.* ¶ 74; M2A Attach. 6 – UNE § 14.5. The M2A includes the provision of all the new requirements in the *UNE Remand Order* that became effective on February 17, 2000, and May 17, 2000. See SWBT's Sparks Aff. ¶ 75-82; *New York Order*, 15 FCC Rcd at 3967, ¶ 31, 4021-4022, ¶ 140 n.420; *Texas Order* ¶ 29.

UNE Combinations

The M2A's UNE combination provisions mirror those contained in the T2A. SWBT combines particular network elements that are not already combined, including new loop-to-switch-port combinations (the UNE Platform or UNE-P) and, under certain conditions, loop-to-interoffice-transport combinations (the Enhanced Extended Loop or EEL). SWBT's Sparks Aff. ¶¶ 90, 92-95; See also, *SBC/Ameritech Merger Order*,²² 14 FCC Rcd at 14875, ¶ 393 (provision of UNE Platform for service to residential customers).

SWBT will combine UNEs for CLECs at rates set by this Commission. See, SWBT's Sparks Aff. ¶¶ 90, 135-139. SWBT has shown that it has developed methods and procedures for new combinations of specific UNEs. See, *id.* ¶¶ 94-95; M2A Attach. 6 – UNE § 14.7.

²² Memorandum Opinion and Order, *Applications of Ameritech, Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control*, 14 FCC Rcd 14712 (1999) ("SBC/Ameritech Merger Order").

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SWBT does not separate requested UNEs that SWBT currently combines in its network unless asked to do so by a CLEC. SWBT's Sparks Aff. ¶ 89. Moreover, SWBT has made its combinations available to all CLECs in Missouri on a legally binding basis through the M2A and arbitrated interconnection agreements. *Id.* ¶¶ 89-90, 92-95; See, M2A Attach. 6 – UNE §§ 14.2, 14.3, 14.4, 14.7.

When a CLEC orders UNEs that are already combined, SWBT does not charge a Central Office Access Charge (COAC). SWBT's Sparks Aff. ¶¶ 137-138; M2A Attach. 6 – UNE § 14.2. For combinations of UNEs that are not contained in the pricing requirements of sections 251 and 252 because they do not already exist in SWBT's network and, therefore, require new work to assemble, SWBT charges the COAC in addition to other applicable UNE charges. SWBT's Sparks Aff. ¶ 137. SWBT does not require CLECs to own or operate any equipment to combine SWBT's UNEs. *Id.* ¶ 97.

SWBT makes various collocation arrangements – including caged, shared-caged, cageless, and virtual collocation – available to CLECs for interconnection and access to UNEs. See, SWBT's Sparks Aff. ¶¶ 33, 46-72; M2A Attach. 13 – Ancillary Functions; See, *Texas Order* ¶ 217. Where space for physical collocation is not available, SWBT permits CLECs to collocate their equipment in adjacent controlled environmental vaults or similar structures, under the same nondiscriminatory terms as traditional physical collocation. SWBT's Sparks Aff. ¶ 55. In addition, SWBT will provide interested CLECs access to a secured frame room or cabinet (if space is not available for a room) that is set aside for accomplishing the necessary connections. *Id.* ¶¶ 96-98. The various collocation options, the secured frame option, and SWBT's offer to combine certain UNEs for CLECs provide multiple methods for CLECs to obtain UNEs without owning or controlling any other local exchange facilities.

Facilities-based CLECs can use these same methods to combine SWBT's network elements with their facilities. In addition, CLECs may request other technically feasible methods of access that are consistent with the provisions of the Act and other governing law. See, SWBT's Deere Aff. ¶¶ 78-81; M2A Attach. 6 – UNE § 2.22; *Texas Order* ¶ 217.

Line Sharing

In the M2A, SWBT makes line sharing available to CLECs on an interim basis, subject to a limited true up, on the same terms and conditions as it offers in the state Texas. See, Staff Report on Compliance with Commission Interim Order, Feb. 23, 2001, p. 9; See *also*, Optional Appendix to Attachment 25; High Frequency Portion of the Loop. The Texas terms for line sharing have been approved by the FCC. In addition, the Commission has opened Case No. TO-2001-440 for the purpose of establishing permanent prices, terms, and conditions for line sharing and line splitting in Missouri. On February 28, 2001, SWBT revised the line sharing provision of the M2A to include establishment of permanent prices in accordance with the final decision in the Commission's Case No. TO-2001-440. The Commission finds it is reasonable for line sharing in Missouri to be offered in the interim, subject to a limited true up, on the same prices, terms, and conditions as SWBT offers in the state of Texas.

SWBT presented evidence of compliance with the FCC's *Line Sharing Order*. SWBT's Chapman Aff. ¶ 53. According to the testimony, SWBT complied with that order by May 29, 2000, a week in advance of the FCC's implementation date. *Id.* at ¶ 87. In addition to the optional amendment in the M2A, CLECs may obtain terms and conditions for xDSL-capable loops and line sharing from SBC's 13-state generic interconnection agreement. *Id.*

Line Splitting

The Texas Commission has addressed the issue of line splitting through the process of an arbitration.²³ The proceeding in Texas is not yet final pending appeal. Even so, the Oklahoma Commission made a condition of its positive recommendation for approval of SWBT's application for interLATA authority in that state (and the FCC subsequently approved SWBT's interLATA application for Oklahoma which included that condition) that the terms and conditions of the Texas line splitting arbitration, once final, be made available for line splitting in Oklahoma as an interim measure. The Commission determines that this is a reasonable approach.

The M2A provides for line splitting on an interim basis, in accordance with the Texas Commission's decision in Arbitration Case No. 22315. *See* Staff Report on Compliance with Commission Interim Order, Feb. 23, 2001, p. 9; *See also*, Optional Appendix to Attachment 25; Line Splitting. The M2A also provides that the interim rates will be subject to a limited true up with permanent rates to be set in the Commission's Case No. TO-2001-440.

Intellectual Property

SWBT offers the same terms and conditions to CLECs in Missouri that the FCC approved in the *Texas Order*. *Texas Order* ¶ 230. SWBT's proposed modifications to the M2A, contained in Exhibit A to Donald Palmer's Reply Affidavit, include SWBT's commitment to "use its best efforts to obtain for CLEC, under commercially reasonable terms, Intellectual Property rights to each unbundled network element necessary for CLECs to use such unbundled element in the same manner as SWBT." SWBT's Palmer Reply Aff. Exh. A, § 7.3.3.1; *See also*, T. 2487 (SWBT's Palmer).

Pricing

The M2A prices for the standard UNEs that CLECs utilize the most in Missouri were established by this Commission through arbitrations in Case Nos. TO-97-40 and TO-98-115. Staff has continually argued that these rates are the proper TELRIC rates to use in Missouri. *See*, T. 3022 (Staff's Stueven). In addition, these rates have subsequently been incorporated into many of the Missouri approved interconnection agreements between SWBT and CLECs. Although SWBT has appealed the two arbitration decisions, SWBT has committed in the M2A to follow the Commission's pricing decisions in those arbitrations, even if SWBT is successful on appeal. M2A General Terms and Conditions § 18.2; *See also*, Response of SWBT to WorldCom's Emergency Motion to Stay the Proceeding, filed Jan. 17, 2001, ¶ 6; and *see*, T. 2419 (AT&T's Bourianoff).

²³ *See* TPUC Docket No. 22315.

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SWBT's cost studies in Case No. TO-97-40 have been determined by this Commission to fully comply with TELRIC. See, e.g., Final Arbitration Order, Case No. TO-97-40 (MO PSC July 31, 1997) (Attach. C – Cost and Pricing Report) (1997 *Final Arbitration Order*). In Direct Testimony filed on September 18, 1996, in Case No. TO-97-40, SWBT witness J. Michael Moore presented SWBT's TELRIC cost studies supporting the nonrecurring and recurring rates SWBT proposed for UNEs. Schedules 2-7, 10. Mr. Moore explained that, in accordance with sections 251(c)(3) and 252(d)(1) of the Act and the FCC's TELRIC principles, these studies identify the entire quantity of the network elements provided. All costs associated with the network elements are included, and those costs are only forward-looking, incremental costs. SWBT's Moore Direct Test. at 2-3, 9-12.

SWBT calculated nonrecurring costs by identifying the work groups involved and the time required to complete each activity identifying the labor costs for the personnel typically performing them, and by multiplying the time required to perform these activities by the labor costs adjusted to represent the planning period of the cost study. In the M2A, monthly recurring and nonrecurring charges (NRCs) from Case No. TO-97-40 are established on a permanent basis. See, UNE Pricing Appendix, fn. 1, p. 11. The Staff compared the Missouri, Texas, Kansas, and Oklahoma NRCs and demonstrated that in most instances, Missouri NRCs were substantially more than Texas NRCs. See, Appendix A to Staff's Updated Multi-jurisdictional Comparison of Rates, filed Feb. 14, 2001. The Commission heard testimony and arguments regarding the method of setting NRCs in the state of Kansas. In that state, a 25 percent discount was taken on NRCs, but the NRCs were not reduced below the Texas prices. This adjustment was made to bring the Kansas NRCs in line with the Texas prices. The Commission finds that it is reasonable for SWBT to adjust the Missouri NRCs in a similar manner.

The M2A as finally submitted reduces the NRCs by up to 25 percent, but not to a level below the corresponding NRC found in the Texas agreement. This adjustment was done in a similar manner as the adjustment in Kansas. See, Staff's Report on Compliance, Feb. 23, 2001, p. 5.

SWBT also modified the M2A to conform DS1 and DS3 rates to those approved in Case No. TO-97-40. SWBT's Hughes Reply Aff. ¶ 7. SWBT has agreed on a prospective basis to true-up its rates for certain cross connects, ISDN-BRI loops, and loop conditioning to conform to a final decision in the SWBT-Covad Arbitration, Case No. TO-2000-322, the Commission's newly established case for the purpose of determining permanent rates for loop conditioning, Case No. TO-2001-439, or other appropriate cases established by the Commission in which additional TELRIC cost study work will be performed. *Id.* ¶ 4, and SWBT's Response to the Interim Order, p. 3; See also, M2A, Attachment 25: DSL, Section 11.4.

Staff identified approximately 110 UNE prices²⁴ proposed in the original version of the M2A that the Commission has not previously analyzed for compliance with

²⁴ These rates are identified in Hughes Reply Affidavit, Attachment A, with a designation "3" indicating they are based on a SWBT MO cost study using what SWBT alleges is the TELRIC cost methodology and inputs that this Commission previously approved in Case No. TO-97-40.

TELRIC standards. See, Attachment B to the Staff's Aug. 28, 2000, Response to SWBT's Updated Record. The Staff later revised its estimate and stated that only 95 of these UNEs were of first impression to the Commission. See, Staff's Summary of Evidence, Comments, and Positions, filed Dec. 26, 2000, p. 15. SWBT proposed rates for these UNEs based on what it claimed were cost studies consistent with the methodology used in Case No. TO-97-40. See, SWBT's Hughes Reply Aff. ¶ 4. Because there has been no independent determination that SWBT's cost studies conform to TELRIC principles, the Commission finds that it is appropriate for SWBT to offer the corresponding FCC-approved Texas UNE prices on an interim basis subject to a limited true up.

The M2A, as finally submitted on February 28, 2001, contains the Texas prices, terms, and conditions for these UNEs. In addition, the Commission has established Case No. TO 2001 438 to set permanent prices, terms, and conditions for these UNEs.

The M2A requires SWBT to provide UNEs at arbitrated rates both to CLECs providing service to business customers for two years from the date of our approval of the M2A and to CLECs providing service to residential customers for three years – assuming FCC approval of SWBT's section 271 application. SWBT's Sparks Aff. ¶ 74. The Commission rejects requests (See, e.g., WorldCom's Comments at 33; AT&T's Comments at 19), to expand the pricing requirements of section 252(d)(1) to include items other than interconnection and UNEs.

In addition to the NRC reductions listed above, the Commission finds that SWBT has addressed AT&T's concern that CLECs would have to pay a \$60 NRC associated with pre-existing 2-wire analog loop and port combinations. See, T. 2318 (AT&T's Bourianoff); T. 3033 (AT&T's Kohly). SWBT witness Tom Hughes explained that SWBT would amend the pricing appendix of the M2A to clarify that SWBT would not assess NRCs for pre-existing 2-wire analog loop and port combinations, subject to true-up to a final Commission order addressing this issue in Case No. TO-98-115 or other further cost proceedings. See, T. 2670, 3025-3026 (SWBT's Hughes). A \$5 charge would apply for a mechanized service order while a \$60 charge would apply to a manual service order. T. 3034-35 (SWBT's Sparks). Mr. Hughes also submitted an attachment to the pricing appendix to the M2A, which was marked as Exhibit 136, in which SWBT documented this clarification. AT&T conceded that the proposal fully meets its concerns. See, T. 3035 (AT&T's Kohly).

The interim rates contained in the M2A are subject to a limited true-up. The Commission has four cases pending to determine permanent prices, terms, and conditions for the interim prices subject to true-up in the M2A. Because of the concern of the lack of certainty for the CLECs to establish a business plan, the Commission finds that a limited true-up period is reasonable. Therefore, the Commission determines that a true-up period that is six months retrospectively from the date of the Commission's order establishing a permanent rate is appropriate. The true-up period that has been included in the M2A is consistent with these Commission findings.

Nondiscriminatory Access to OSS

SWBT submitted substantial evidence that the same OSS systems, processes, and procedures in place in Texas are used in Missouri and across SWBT's

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region. See, SWBT's Lawson Reply Aff. ¶¶ 17-24. Ernst & Young attested that SWBT uses the same OSS interfaces in Missouri as it uses in Texas and throughout its five-state region. See, Ernst & Young Report of Independent Accountants. Although Sprint and WorldCom challenge this conclusion (See, Sprint's DeWolf Aff. ¶¶ 14-15; WorldCom's Comments at 4-5) the Commission is not persuaded by those claims and finds that SWBT has shown, by a preponderance of the evidence, that its OSS operate on a region-wide basis.²⁵

SWBT has established OSS performance measurements and standards with self-executing damages provisions. See *generally*, SWBT's Dysart Aff.; M2A Attach. 17 – Performance Remedy Plan. These measurements are sufficient to allow interested parties to monitor SWBT's performance, as well as to ensure SWBT's continued compliance with its OSS obligations. Ernst & Young certified that SWBT was accurately reporting these performance measurements. See, Ernst & Young Report of Independent Accountants, CPM Results Examinations Report at 1-2; see also, T. 2715-2717 (Ernst & Young's Dolan, Horst). Staff was "very satisfied" with Ernst & Young's evaluation. See, T. 2734 (Staff's Winter).

SWBT's OSS interfaces are presently being used at commercial volumes. Usage of all of SWBT's interfaces has increased substantially since the submission of the initial Texas application. See, SWBT's Lawson Reply Aff. ¶¶ 12-15.

AT&T and WorldCom complain that some of these figures are not Missouri-specific. See, AT&T's Willard Test. at 61; WorldCom's Comments at 3-4. But SWBT's OSS are regional, so it is wholly appropriate for commercial volume figures to be tracked on a region-wide basis. See, SWBT's Lawson Reply Aff. ¶¶ 9-11. In any case, SWBT now reports most OSS performance measures on a state-specific basis, allowing the monitoring of Missouri performance to show that the same nondiscriminatory access to OSS functions demonstrated by SWBT in Texas is being provided to CLECs in Missouri. See, *id.*

The third-party test of SWBT's systems conducted by Telcordia under the auspices of the Texas Commission "provides evidence of the functionality and capacity of SWBT's OSS in several important areas." *Texas Order* ¶ 103. Telcordia concluded that SWBT's systems process CLEC transactions in a nondiscriminatory fashion and that they can do so at reasonably foreseeable levels of demand. See, SWBT's Lawson Post Oct. Hearing Reply Aff. ¶ 12; Telcordia Technologies, Inc., *SWBT OSS Readiness Report* at ES 1, 7 (Sept. 1999) (filed as Attachment A to SWBT's Lawson Aff.) (Telcordia Final Report). Comments regarding the adequacy of the test itself have been thoroughly addressed by the Texas Commission and the FCC.

Because SWBT's OSS are the same throughout its region, the findings of Telcordia in Texas are equally valid in Missouri. At this Commission's direction, Ernst & Young determined that the 1Q2000 augmented workload volumes tested in the Telcordia capacity test included Missouri commercial volumes.²⁶ Ernst &

²⁵ The CLECs' claims are also severely undermined by their insistence that problems they experienced while operating in Texas are relevant to the Commission's review of SWBT's OSS in Missouri. See, e.g., AT&T's Willard Test. at 61-64.

²⁶ Ernst & Young Interim Report, Appendix A, Item 2.

Young also testified and answered questions before this Commission in November regarding its conclusions. See T. 2702-2703 (Ernst & Young's Kelly). Staff concluded from Ernst & Young's report that SWBT had sufficient capacity to handle Missouri orders. See T. 2732 (Staff's Steven). Moreover, Telcordia's recent scalability report indicates that SWBT's scalability process is adequate to account for future capacity.²⁷ See, SWBT's Lawson Reply Aff. ¶¶ 13-17.

AT&T filed a report after the technical conference stating its dissatisfaction with the conference. AT&T requested that the Commission direct SWBT and Ernst & Young to provide AT&T and other interested parties, the confidential work papers of Ernst & Young. Staff and SWBT, on the other hand, reported that Ernst & Young has provided full and detailed responses and that the conference had satisfied the requirements of the request for proposal of the Commission. The Commission relies on these reports and the evidence presented to it in its November proceeding in finding that Ernst & Young's analysis was thorough and reliable and that AT&T's concerns regarding the scalability of SWBT's OSS processes to meet capacity demands are unfounded. See, AT&T's Post Oct. Hearing Comments at 30.

SWBT's change management process (CMP) allows SWBT to notify CLECs of new interfaces and changes to existing OSS interfaces; it also provides for the identification and resolution of CLECs' concerns regarding SWBT's interfaces. See, SWBT's Lawson Aff. ¶¶ 353-415. The CMP's effectiveness and SWBT's adherence to it over time were monitored by the Texas Commission, examined by Telcordia, and approved by the FCC. See, *Texas Order* ¶¶ 105, 110-118. CLECs played a significant role in establishing the CMP, and they are afforded ample opportunity to supply input regarding their needs or concerns, including the ability to halt implementation through a go/no go vote. See, SWBT's Lawson Aff. ¶¶ 21, 360-366, 381-388, 403-409; *Texas Order* ¶¶ 110-118.

The Commission finds WorldCom's complaints with the CMP to be unfounded. See, WorldCom's Post Oct. Hearing Comments at 2. To the contrary, the Commission finds that SWBT's response to WorldCom's change requests demonstrates the significant input CLECs have in that process. See SWBT's Lawson Post Oct. Hearing Reply Aff. ¶¶ 3-4.

The Commission further finds that SWBT provides adequate training and support for the use of its OSS. See SWBT's Lawson Aff. ¶¶ 22-66; *Texas Order* ¶¶ 144-146. SWBT has established an Information Services (IS) Call Center, which is available 24 hours per day, seven days per week, to assist CLECs that have questions or problems regarding electronic access to OSS functions, and offers on-line assistance via its Internet site. See, SWBT's Lawson Aff. ¶¶ 24-32; See, *Texas Order* ¶ 145.

SWBT's Local Service Center (LSC) and Local Operations Center (LOC) provide CLECs with contact points for issues regarding their ordering, provisioning, maintenance and repair, and billing needs, as well as the execution of complex transactions requiring manual handling. See, SWBT's Lawson Aff. ¶ 23; SWBT's Noland Aff. ¶¶ 19-31.

²⁷ SWBT MVS Scalability Report, Investigation of SWBT Telephone Company's Entry into the Texas InterLATA Telecommunications Market, Project No. 20000 (Tex. PUC filed Aug. 2000).

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AT&T and WorldCom allege that SWBT's manual handling at its support centers leads to the introduction of errors into orders. See, e.g., AT&T's Willard Test. at 23-26; WorldCom's Comments at 7-8. But such occurrences do not show a general trend of discrimination. SWBT presented credible evidence that the cited occurrences were exceptions to the overall high-quality performance of SWBT's LSC/LOC, especially in light of the increase in transaction volumes. See generally, SWBT's Noland Reply Aff.; see also, *Texas Order* ¶ 181; Telcordia Final Report at 95, § 4.5.4.5.

AT&T also complains that SWBT answers calls too slowly at the Alliance LSC. See, AT&T's Willard Test. at 32-33; AT&T's Fettig Test. at 49-50. The Commission finds that the data in SWBT's performance reports show the contrary, and the Commission is persuaded by SWBT's explanation that results for two months were attributable to an ultimately unsuccessful attempt to improve performance by creating a call center devoted to UNE-P orders. See, SWBT's Noland Reply Aff. ¶¶ 17-18.

At the time of its June 2000 filing, SWBT had offered 11 classes and 14 workshops on using its electronic OSS interfaces, for a total of 40-and-one-half class days of available training, including new workshops to cover high-speed voice and data services and OSS interface integration. See, SWBT's Lawson Aff. ¶¶ 39-51; SWBT's Sparks Aff. ¶¶ 149-165. Of the hundreds of CLEC employees who have received training, 98 percent indicated that they were satisfied with the instruction they received. See, SWBT's Lawson Aff. ¶ 50.

SWBT posts training materials – such as job aids, manuals for using OSS, and troubleshooting guidelines – on its Internet site. See, *id.* ¶ 40. The training and documentation offered by SWBT allows Missouri CLECs to “understand how to implement and use all of the OSS functions available to them.” *Texas Order* ¶ 146. The Commission finds that SWBT's training offerings are adequate.

Pre-ordering consists of the exchange of information between SWBT and a CLEC, such as customer address verification, feature availability, telephone number assignments, and due date availability. SWBT offers CLECs four primary electronic interfaces to access pre-ordering functions: Easy Access Sales Environment (EASE), Verigate, DataGate, and the industry standard EDI and CORBA. See, SWBT's Lawson Aff. ¶¶ 67-86; M2A Attach. 2 – Ordering and Provisioning – Resale § 2; M2A Attach. 7 – Ordering and Provisioning Unbundled Network Elements §§ 2, 4.

SWBT's OSS are available to CLECs at or above the established 99.5 percent benchmarks and these interfaces provide CLECs with “real time” access to pre-ordering functions at parity with SWBT's retail operations. See, SWBT's Lawson Aff. ¶¶ 15, 66; SWBT's Dysart Aff. Attach. C (PMs 1-4); SWBT's Dysart Reply Aff. ¶¶ 48-51 and Attach. A (same); SWBT's Dysart Post Nov. Hearing Aff. Attachs. A and B (same). The Commission notes that SWBT also offers access to its service centers, which will perform pre ordering inquiries manually for those CLECs that have chosen not to employ electronic interfaces and for those complex transactions requiring manual handling. See generally, SWBT's Noland Aff.

CLECs' comments regarding pre ordering problems are minor and unpersuasive. See, e.g., AT&T's Willard Test. at 19, 21-22, 38. AT&T's concerns

with the DataGate interface have been convincingly addressed by SWBT's witnesses. See, AT&T's Willard Test. at 19; SWBT's Lawson Reply Aff. ¶¶ 48-55. Ms. Cullen has persuasively explained that the delay reflected in the October data for the EDI translation protocol metric (PM 1.12) was the result of an intermittent problem that SWBT has since corrected. See, SWBT's Cullen Post Nov. Hearing Aff. ¶¶ 5-6; T. 2984-2985 (SWBT's Cullen).

For the ordering and provisioning of services, SWBT provides CLECs a choice of four primary electronic interfaces: EASE, EDI, LEX, and Southwestern Order Retrieval and Distribution (SORD). See, SWBT's Lawson Aff. ¶¶ 92-115. These interfaces allow CLECs to transmit service requests to SWBT's back end systems and to obtain order confirmation data, service order status, and service order completion information from SWBT while an order is being provisioned. See, *id.* ¶¶ 90-91. Once a service order has been generated in SWBT's back end systems, a firm order confirmation (FOC) is generated and returned to CLECs electronically. See, SWBT's Lawson Aff. ¶¶ 179-181.

AT&T has raised various complaints about FOCs (see, AT&T's Willard Test. at 40-44; AT&T's Fettig Test. at 34-35), but SWBT's performance for FOC return in Missouri has met the applicable benchmarks in at least two of the three months from May to July 2000 for nearly every submeasure for which data are available; those submeasures SWBT missed during this three-month-period, it met during the subsequent three-month-period (August to October 2000). See, SWBT's Dysart Reply Aff. ¶¶ 53-57 and Attach. A (PMs 5, 94); SWBT's Dysart Post Nov. Hearing Aff. ¶ 17 and Attachs. A and B (same); SWBT's Noland Post Nov. Hearing Aff. ¶¶ 3-14. This performance, coupled with the overall good FOC return performance shown by the same SWBT systems in Texas and approved by the FCC, demonstrates that SWBT is providing, and has the means to continue to provide, timely FOCs to CLECs in Missouri. See, *Texas Order* ¶ 171.

If an order is unable to flow through to SWBT's back end systems, an electronic reject notice may be returned to the CLEC. See, SWBT's Lawson Aff. ¶¶ 182-185. SWBT's performance with regard to PM 10.1 (Percentage of Manual Rejects Received Electronically and Returned in Five Hours) fell short of the 97 percent benchmark in each of the months of September, October, and November 2000.

AT&T criticizes the time it takes SWBT to return manual reject notices. See, AT&T's Willard Test. at 33-35; AT&T's Fettig Test. at 38-41. Yet, in Missouri, the mean time to return manual rejects has been significantly shorter than the interval approved by the FCC in Texas. SWBT's Noland Reply Aff. ¶ 41; SWBT's Dysart Reply Aff. ¶¶ 63-65 and Attach. A (PM 11.1); SWBT's Dysart Post Nov. Hearing Aff. Attachs. A and B (same). The average intervals for returning manual rejects to Missouri CLECs were consistently below four hours, and never above 5.7 hours, between May and October, 2000 (see, SWBT's Dysart Reply Aff. Attach. A (PM 11.1); SWBT's Dysart Post Nov. Hearing Aff. Attachs. A and B (same)), whereas the FCC concluded that SWBT had provided Texas CLECs with timely reject notices with intervals of 7.55, 6.41, and 4.93 hours for three consecutive months. *Texas Order* ¶ 175, fn.472.

There is a disparity in flow-through rates between SWBT's retail operations and CLECs for orders submitted through LEX. See, AT&T's Willard Test. at 27-28;

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AT&T's Fettig. Test. at 41-42. But SWBT's overall flow-through figures, especially in light of the continued improvement in flow-through percentage over LEX and the excellent performance of LEX and EDI together, show that SWBT is offering nondiscriminatory access to CLECs. See, SWBT's Lawson Reply Aff. ¶¶ 59-63; SWBT's Dysart Reply Aff. ¶¶ 66; *Texas Order* ¶¶ 179-183.

SWBT has introduced enhancements designed to increase flow-through and reduce the frequency of CLEC errors that cause orders to fall out for manual processing by creating additional "up front" edits at the request of CLECs. See, SWBT's Lawson Aff. ¶¶ 157-164, 362; SWBT's Lawson Reply Aff. ¶¶ 65-66. The Commission therefore finds little merit in AT&T's complaint that SWBT has not introduced enough "up front" edits. See, AT&T's Willard Test. at 39-40.

Once an order is provisioned, SWBT returns a completion notification to CLECs. See, SWBT's Lawson Aff. ¶¶ 188-196. If, for some reason, the order will not or may not be provisioned on the due date given to a CLEC on their FOC, SWBT issues a jeopardy notification. See, *id.* ¶¶ 186-187.

AT&T alleges problems with the timeliness and accuracy of SWBT's return of jeopardies and completion notifications for certain orders. See, AT&T's Willard Test. at 45-51, 55-56. SWBT's performance has been improving for completion return over LEX. See, SWBT's Noland Reply Aff. ¶¶ 37-38; SWBT's Dysart Reply Aff. ¶¶ 58-59. With its excellent performance considering EDI and LEX together (see SWBT's Dysart Reply Aff. ¶¶ 61-62), AT&T's experience represents an anomaly affecting a limited number of orders.

WorldCom has complained that it has difficulty viewing its orders and blames this difficulty on SWBT's practice of reusing "C order" numbers. See, WorldCom Post Oct. Hearing Comments at 4. The Commission finds that in the three examples WorldCom presented where SWBT provided it with an incorrect "C order" number, each involved the relatively new situation in which an end user switches from one CLEC to another. The Commission finds that these instances do not rise to the level of discriminatory treatment. See, SWBT's Lawson Post Oct. Hearing Reply Aff. ¶¶ 9-12.

WorldCom's complaints about SWBT's return of jeopardies and service order completions (see, WorldCom's Post Oct. Hearing Comments at 2-5) are unsubstantiated. They therefore provide no basis from which this Commission can find that SWBT is providing discriminatory access to its OSS. See, SWBT's Joint Dysart, Noland, D. Smith Post Oct. Hearing Reply Aff. ¶¶ 49-52.

SWBT provides CLECs a choice of two electronic interfaces for maintenance and repair – Toolbar Trouble Administration (TBTA), the same graphic-user interface (GUI) used by SWBT's business customers and interexchange carriers (IXCs), and the industry standard Electronic Bonding Trouble Administration (EBTA) – enabling them to report troubles and request repair of resale services and UNEs, and to check on the status of these trouble reports. See, SWBT's Lawson Aff. ¶¶ 19, 256-272; M2A Attach. 3 – Maintenance – Resale; M2A Attach. 8 – Maintenance – UNE. CLECs also have the option of calling the LOC to report any troubles and request maintenance or repair. See, SWBT's Noland Aff. ¶¶ 77-78.

Although Sprint claims that it takes five days before a new customer's records can be accessed via SWBT's TBTA, see, Sprint's DeWolf Aff. ¶ 16, the Commission

finds Sprint's complaint to have been outdated when it was made and finds that CLECs can create trouble reports on or after the service order due date. See, SWBT's Lawson Reply Aff. ¶ 79; SWBT's Noland Aff. ¶¶ 85-86.

SWBT offers five electronic billing interfaces – Bill Plus, EDI, Bill Data Tape (BDT), Bill Information, and the Usage Extract Feed – allowing them to bill their customers, to process their customers' claims and adjustments, and to view SWBT's bill for services provided to the CLEC. See, SWBT's Lawson Aff. ¶¶ 273-286; See *generally*, SWBT's McLaughlin Aff.; See *also*, M2A Attach. 4 – Connectivity Billing – Resale; M2A Attach. 9 – Billing – Other.

AT&T is the only CLEC to raise issues of billing with regard to SWBT's provision of OSS. See, AT&T's Willard Test. at 58-59; AT&T's Fettig Test. at 48. The billing performance measures are adequate to evaluate SWBT's billing performance, and the record reflects that SWBT generally provides CLECs accurate and timely bills and usage information. See *generally*, SWBT's McLaughlin Aff.; SWBT's McLaughlin Reply Aff.; SWBT's Dysart Reply Aff. ¶¶ 69-70 & Attach. B (PMs 14-19); SWBT's Noland Reply Aff. ¶¶ 45, 48; *Texas Order* ¶¶ 210-212. The Commission concludes that SWBT has adequate procedures to update automatically its billing systems. The Commission further concludes that SWBT has manual processes to address orders that do not update properly.

AT&T has concerns (AT&T's Willard Test. at 59) about the potential for double billing, but compared with SWBT's evidence, the evidence of double billing is insufficient and unpersuasive. The Commission finds that SWBT has adequate processes and procedures in place to rectify in a timely manner any instances of double billing. See, SWBT's McLaughlin Aff. ¶¶ 16-18; SWBT's McLaughlin Reply Aff. ¶¶ 6-9.

(3) Checklist Item 3: Nondiscriminatory Access to Poles, Ducts, Conduits, and Rights-of-Way

SWBT has developed a Master Agreement governing access to poles, ducts, conduits, and rights-of-way, which is available to interested CLECs or may be used by a CLEC as a starting point for negotiations with SWBT. See, SWBT's Hearst Aff. ¶ 9; See *also*, M2A Attach. 13 – App. Poles, Conduits, and Rights-of-Way. SWBT has entered into approved interconnection agreements customizing the Master Agreement with AT&T and other carriers. See SWBT's Hearst Aff. ¶ 9.

SWBT has provided carriers in Missouri with more than 915,000 duct-feet of conduit and attachments to 413 poles; in Missouri, SWBT has not turned down a single request for access to the facilities covered by this checklist item. *Id.* ¶ 10; SWBT's Johnson Reply Aff. Attach. A. SWBT has established rates that are in accordance with FCC requirements. See, M2A Attach. 13 – App. Poles, Conduits, and Rights-of-Way; SWBT's Hearst Aff. ¶ 33.

(4) Checklist Item 4: Local Loops

SWBT currently offers unbundled access to 2-wire and 4-wire analog and digital loops, including loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, DS1- and DS3-level signals. See,

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SWBT's Deere Aff. ¶¶ 83-85; SWBT's Sparks Aff. ¶¶ 80-82 & Attach. E (optional M2A Amendment for *UNE Remand Order*); *New York Order*, 15 FCC Rcd at 4095, ¶ 268.

SWBT's performance plan captures all aspects of the pre-ordering, ordering, and provisioning of unbundled loops. *See generally*, SWBT's Dysart Aff. SWBT has also committed to providing access to additional loop types and conditioning pursuant to the Special Request process, as well as to any additional loop types that either the FCC or this Commission identifies for unbundling. *See*, SWBT's Deere Aff. ¶¶ 77-80; M2A Attach. 6 – UNE § 2.22.

SWBT's performance across available loop types in Missouri is at least equal in quality to that demonstrated in Texas when the FCC approved SWBT's section 271 application. *See, id.* Attach. A; *See also*, SWBT's Dysart Reply Aff. Attach. A; SWBT's Joint Dysart, Noland, D. Smith Post Oct. Reply Aff. Attach. A; SWBT's Dysart Post Nov. Hearing Aff. Attachs. A and C.

AT&T contends that SWBT's performance in provisioning 8.0 dB UNE loops has been substandard, referencing isolated instances in which SWBT failed to meet a particular metric in a given month. *See*, AT&T's Fetting Test. at 58-59; AT&T's Post Oct. Hearing Comments at 33. The comprehensive and objective performance data indicate that SWBT has provided high quality 8.0 dB UNE loops in a timely manner. SWBT has met or surpassed the three-day benchmark for 8.0 dB UNE loop average installation interval for each of the twelve months ending October 2000, and installed an average of 96.7 percent of 8.0 dB UNE loop orders (1 10 loops) within the three day benchmark from November 1999 through October 2000. *See*, SWBT's Dysart Post Nov. Hearing Aff. Attach. C (PMs 55-01, 56-01).

SWBT has exceeded the parity standard for 8.0 dB loop missed due dates (field work) for each of the six months from May to October 2000. These were the only months in which there was a sufficient number of orders to provide a statistically significant portrait of SWBT's performance during the 12 month period leading up to October 2000. *See, id.* (PM 58-01).

SWBT has also exceeded the parity standard for trouble report rates (PM 65-01) for each of the eleven months preceding November 2000. *See, id.* Attach. C.

Gabriel Communications contends that SWBT repeatedly fails to meet installation dates for the unbundled DS1 loops and DS1 transport UNEs used by Gabriel to service its customers. *See*, Gabriel's and NextLink's Post Oct. Hearing Comments at 18. Gabriel goes so far as to allege that SWBT has missed approximately 60 percent of installation appointments for the period August 1 through October 3, 2000. *See, id.* SWBT's performance data refutes this assertion. SWBT has provided better than parity service to Gabriel across loop types. *See*, SWBT's D. Smith Post Nov. Hearing Aff. ¶ 3. From November 1999 through December 2000, Gabriel received parity or better service for 98 percent of 336 disaggregated performance measures. During the same time period, SWBT has been out of parity for PM 58-06 (missed due dates DS1 loops) for only a single month in each of the Kansas City and St. Louis market areas.

On February 22, 2001, Gabriel requested the Commission's permission to file the supplemental Affidavit of Edward J. Cadieux. Mr. Cadieux again expresses his concern with SWBT's performance under PM 58-06. Mr. Cadieux included the results of PM 58-06 for the months of October 2000 through January 2001 for both the Kansas City and the St. Louis markets.

Throughout this proceeding, the Commission has accepted the comments and testimony of the parties as part of the record in an effort to make an informed decision. Therefore, the Commission also accepts these late-filed comments into the record.

The Commission finds, however, that other than the updated percentages, Gabriel's comments add nothing further to the Commission's analysis. Gabriel does not address in its updated information, SWBT's performance in the aggregate for PM 58. In addition, Gabriel's updates show improvement in the most recent months (especially with regard to Kansas City). Thus, the Commission finds that SWBT has adequately addressed the reasons for its failure to achieve parity in every instance under PM 58. See, SWBT's Dysart post Nov. Hearing Aff. ¶ 28; See also, SWBT's D. Smith Post Nov. Hearing Aff. ¶ 3.

As in Texas, SWBT offers CLECs in Missouri a choice between two different methods of coordinated conversions – the fully coordinated hot cut process (CHC) and the frame due time hot cut process (FDT) – allowing CLECs to select the process that best fits their resources and priorities. See generally, SWBT's Noland Aff.; SWBT's D. Smith Reply Aff. Reconciled performance data likewise demonstrate that SWBT completes CHC and FDT conversions without a service outage at a rate well above the 95 percent standard articulated by the FCC. See SWBT's D. Smith Reply Aff. ¶ 14. SWBT received trouble reports within seven days for a mere 1.14 percent of CHC conversions and 2.31 percent of FDT conversions between May and July 2000, again meeting or bettering the two percent level used by the FCC in the *New York Order*. See *id.* ¶ 25.

AT&T claims that SWBT's hot cut performance is not adequately measured because Version 1.7 of SWBT's performance measurements did not go into effect in Missouri until October 2000. AT&T's Post Oct. Hearing Comments at 32. But the FCC approved SWBT's Texas 271 application on the strength of performance data generated by Version 1.6 of SWBT's measurements, the same evidence on which SWBT relies in this proceeding. See, SWBT's Reply Br. at 55-56; SWBT's Joint Dysart, Noland, D. Smith Post Oct. Hearing Reply Aff. ¶ 10. Furthermore, SWBT has now been operating under Version 1.7 for several months.

While Staff pointed out during the October 8-9 question and answer session that SWBT has fallen short of the benchmark for PM 114.1 (loop disconnect/cross-connect interval – CHC with loop) over the five months preceding that session, the business rules for this measure were changed during the most recent six-month review in Texas. See, Staff's Post Oct. Hearing Comments at 30. Under Version 1.6 of SWBT's performance plan, the interim benchmark for PM 114.1 was absolute perfection, a standard that SWBT nearly attained. See, SWBT's Dysart Post Nov. Hearing Aff. ¶ 42. Between August and October 2000, for example, SWBT timely completed 99.24 percent of CLEC CHC conversion orders. During the six-month review in Texas, the 100-percent benchmark was discarded and replaced with a diagnostic measure. See, *id.* ¶ 43.

The Commission finds that SWBT provisions high-quality coordinated conversions in a timely manner and with a minimum of service disruption in satisfaction of the applicable FCC hot cut standards for both CHC and FDT conversions. See, *New York Order*, 15 FCC Rcd at 4104-05, ¶ 291. Therefore, the Commission finds

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that SWBT provides nondiscriminatory access to unbundled loops for the provisioning of advanced services. *See generally*, SWBT's Chapman Aff.; SWBT's Chapman Reply Aff.; SWBT's Chapman Post Oct. Hearing Aff.; SWBT's Chapman Post Oct. Hearing Reply Aff.

SWBT utilizes the same processes and procedures for the pre-ordering, ordering, and provisioning of xDSL-capable loops and related services in Missouri as it does in Texas. *See*, SWBT's Chapman Aff.; SWBT's Chapman Reply Aff.; *See also*, SWBT's Lawson Aff. Performance data demonstrate that SWBT: (i) provides xDSL-capable loops to competitors in substantially the same interval as to its retail customers; (ii) provides xDSL-capable loops to competitors that are equal in quality to those that service SWBT customers; (iii) performs quality maintenance and repair functions for competitors' xDSL-capable loops in substantially the same time frame as for its Advanced Services Affiliate, SBC Advanced Solutions Inc. (ASI); and (iv) provides competitors with access to the exact same loop makeup information available to ASI, and in the same time frame. *See generally*, SWBT's Dysart Aff.; SWBT's Dysart Reply Aff.; SWBT's Joint Dysart, Noland Post Oct. Hearing Reply Aff.; SWBT's Dysart Post Nov. Hearing Aff.

While SWBT has been out of parity for missed installation appointments, the disparity is predominantly explained by lack of facilities: 33 of 69 missed due dates in July 2000, 25 of 69 missed due dates in August 2000, and 23 of 45 missed due dates in September 2000 were due to a lack of available facilities. *See*, SWBT's Joint Dysart, Noland, D. Smith Post Oct. Hearing Reply Aff. ¶ 34; SWBT's Dysart Post Nov. Hearing Aff. ¶ 28. When lack of facilities is removed from the calculus, SWBT's performance has been steadily improving: from 11 percent (36/325 in July), to 10.5 percent (44/420) in August 2000, to 4.6 percent (22/471) in September 2000. *See*, SWBT's Joint Dysart, Noland, D. Smith Post Oct. Hearing Reply Aff. ¶ 34. SWBT's September 2000 performance is better than the new 5 percent benchmark established by Version 1.7 for non line shared loops. *See, id.*

SWBT additionally has established a fully operational separate advanced services affiliate. *See generally*, SWBT's Brown Aff. ASI became SBC's exclusive provider of new interstate advanced services in Missouri on January 12, 2000. *See, id.* ¶ 7. ASI began providing new intrastate advanced services on March 8, and became the provider of record for SWBT embedded customers on those same days. *Id.*

ASI uses the same ordering and provisioning systems and procedures that CLECs use when ASI requires unbundled loops. *Id.* ¶ 12. Since line sharing became operational throughout SWBT's region on May 30, 2000, ASI orders the high-frequency portion of the loop using the same interfaces used by other CLECs.

In September 2000, ASI additionally began to offer xDSL service to customers in the "yellow zone" – i.e., at loop lengths between 12,000 and 17,499 feet. *See*, T.2972 (ASI's Brown).

ASI is operating in accordance with structural separation and nondiscrimination rules that were approved by the FCC in both the *SBC/Ameritech Merger Order* and the *New York Order*. *See generally* SWBT's Brown Aff.; SWBT's Brown Reply Aff. Having reached the "steady state" operationally, ASI's independent operations provide further guarantees that there is a level playing field in the market for advanced services in Missouri.

Primary Networks questions SWBT's DSL provisioning performance record. SWBT provided installation parity for non-conditioned lines during each of the four months from July 2000 through October 2000. See, SWBT's Joint Dysart, Noland, D. Smith Post Oct. Hearing Reply Aff. ¶¶ 32-33; SWBT's Dysart Post Nov. Hearing Aff. Attach. A (PM 55.1-01).

The trouble report rate (PM 65-08) for CLECs has been well below that for ASI over the five-month period from June through October 2000. See SWBT's Joint Dysart, Noland, D. Smith Post Oct. Hearing Reply Aff. ¶ 37; Dysart Post Nov. Hearing Aff. Attach. A.

For PM 58-09 (Percent Installation Trouble Reports Within 30 Days), SWBT was in parity for each of the months from June through October 2000. See, SWBT's Joint Dysart, Noland, D. Smith Post Oct. Hearing Reply Aff. ¶ 35; SWBT's Dysart Post Nov. Hearing Aff. Attach. A.

Comprehensive performance data refute CLEC arguments that SWBT has failed to provide nondiscriminatory access to xDSL pre-ordering and ordering functions. While Primary Networks criticizes SWBT's xDSL FOC return performance (PM 5.1), SWBT's performance data demonstrate that SWBT actually met or exceeded the relevant benchmark for all but 2 of 24 disaggregated measures between July and October 2000. See SWBT's Joint Dysart, Noland, D. Smith Post Oct. Hearing Reply Aff. ¶ 30; SWBT's Dysart Post Nov. Hearing Aff. Attach. A.

SWBT provides timely access to loop makeup information. SWBT was in parity for each of the three months from August to October 2000 for the return of loop makeup information (Version 1.7 PM 1.1-01). Also, the average response time over the period from November 1999 to October 2000 was almost identical for CLECs and SWBT/ASI (2.98 days versus 2.73 days). See Dysart Post Nov. Hearing Aff. Attach. C (DOJ-PM 57). The Commission finds that SWBT provides CLECs nondiscriminatory access to all loop makeup information in its possession. See *generally*, SWBT's Chapman Aff.

In an effort to help CLECs work around any problems they may face due to inaccuracies in SWBT's DSL databases, SWBT has voluntarily offered to extend its "yellow zone" line sharing trial to stand-alone xDSL-loops. See T.2964-2972 (SWBT's Chapman). This voluntary offering will reduce the provisioning interval for loops requiring conditioning by 8-10 days. See *id.* T.2965-2966.

There is no merit to IP Communications' repeated assertion that SWBT must provide access to perfect loop makeup information. See, IP Communications' Comments at 15-18; T.2968-2971 (IP's Siegel); see also, Sprint's Post Oct. Hearing Comments at 3-4.

SWBT made line sharing available in Missouri before the FCC's June 6, 2000 deadline. See, SWBT's Chapman Aff. ¶ 53. While CLECs have yet to begin to utilize the line sharing option in Missouri, SWBT has already demonstrated its ongoing ability to provision commercial volumes of line-shared loops through the services provided to ASI. Any CLEC can provide integrated voice and data service over a single loop, as can a CLEC and a designated data provider. See *generally*, SWBT's Chapman Post Oct. Hearing Reply Aff.; T.3091-3092, 3096 (SWBT's Chapman). SWBT explained how a CLEC could do so, and the FCC already has found that "SWBT allows competing carriers to provide both voice and data services over the UNE-P." *Texas Order* ¶ 325.

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In addition, the Commission has established Case No. TO-2001-440 to examine the prices, terms, and conditions of line sharing in Missouri. In the meantime, SWBT has made line sharing available in the M2A at interim rates identical to line sharing in the Texas agreement. These rates are subject to a limited true up with the permanent rates set in Case No. TO-2001-440. See, M2A, Optional Line Sharing Amendment – Appendix to Attachment 25: xDSL. Therefore, the Commission finds that SWBT has fully implemented the line-sharing performance measurements effective with the reporting of October 2000 data. See, SWBT's Dysart Post Nov. Hearing Aff. Attachs. B & D.

AT&T contends that SWBT must provide additional services and support to enable CLECs to engage in line splitting. See, AT&T's Post Oct. Hearing Comments at 36 40; T.3086-3090 (AT&T's Cowlshaw). "Line splitting" is the shared use of an unbundled loop for the provision of voice and data services by a voice CLEC and a data CLEC. The voice CLEC and data CLEC may or may not be the same entity. This is different from "line sharing," in which an ILEC provides voice service and a CLEC provides data service. CLECs have the ability to engage in line splitting today under SWBT's current offerings. See *generally*, SWBT's Chapman Post Oct. Hearing Reply Aff.; T.3091-3092, 3096 (SWBT's Chapman).

A CLEC may purchase an xDSL-capable loop UNE from SWBT and then provide both voice and data services over the loop, and it may purchase UNE switching to provide voice services. See SWBT's Chapman Post Oct. Hearing Reply Aff. ¶ 4. A single CLEC may choose to use the loop to provision both data and voice services, or one CLEC could provide voice service and another CLEC could provide data service. See *id.*

SWBT has offered in the M2A the same prices, terms, and conditions for line splitting in Missouri as in the Texas arbitration, once final, on an interim, subject to a limited true up with permanent prices, terms, and conditions to be set by the Commission in Case No. TO-2001-440. See Optional Line Splitting Amendment – Appendix to Attachment 25: xDSL. The Commission finds until Case No. TO-2001-440 is decided, nothing further is required by SWBT than its current offerings.

(5) Checklist Item 5: Unbundled Local Transport

SWBT supplies dedicated transport between a SWBT tandem or end office and a CLEC tandem or end office at standard transmission speeds of up to OC-48. SWBT's Deere Aff. ¶¶ 101-102. CLECs may obtain dedicated transport with levels of capacity higher than OC-48 through an optional amendment to the M2A. SWBT's Sparks Aff. ¶¶ 80-81 & Attach. E. SWBT permits CLECs to use dark fiber as an unbundled element to provide their own dedicated transport. SWBT's Deere Aff. ¶ 115; SWBT's Sparks Aff. ¶¶ 99-100; M2A Attach. 6 – UNE § 8.2.2. SWBT also makes available cross-connections for use with unbundled dedicated transport. SWBT's Deere Aff. ¶ 115.

SWBT offers shared (or common) transport between its central office switches, between its tandem switches, and between its tandem switches and central office switches, in accordance with the "shared transport" requirements of the FCC's *UNE Remand Order*. See SWBT's Sparks Aff. ¶ 101; SWBT's Deere Aff. ¶ 110. SWBT will combine unbundled 2- or 4-wire analog or digital loops with unbundled

voice-grade DS0, DS1, or DS3 dedicated transport to provide new EEL arrangements. SWBT's Sparks Aff. ¶¶ 92-93; M2A Attach. 6 – UNE § 14.7.

Staff has noted that not all unbundled local transport prices contained in the M2A have undergone the scrutiny of this Commission to determine if they are compliant with TELRIC. In response to this, the Commission has included in Case No. TO-2001-438, those prices, terms, and conditions for local transport that were not previously reviewed. The prices offered in the M2A are similar to the prices approved in Texas and will be subject to a limited true up with the permanent prices set in Case No. TO-2001-438.

(6) Checklist Item 6: Unbundled Local Switching

SWBT provides CLECs unbundled switching capability with the same features and functionality available to SWBT's own retail operations. SWBT provides requesting carriers access to line side and trunk side switching facilities, plus the features, functions, and capabilities of the switch. See SWBT's Deere Aff. ¶ 131; SWBT's Sparks Aff. ¶ 102. See *generally Texas Order* ¶ 339.

SWBT offers CLECs all the vertical features the switch is capable of providing. See SWBT's Deere Aff. ¶¶ 133, 140. SWBT also offers any technically feasible routing features, such as the ability to route calls to a CLEC's own directory assistance and operator services facilities over CLEC-designated trunks. *Id.* ¶¶ 137-139.

SWBT provides two methods by which CLECs using unbundled local switching may have calls "custom routed" according to their own specifications. *Id.* ¶¶ 137-138 (discussing the Advanced Intelligent Network (AIN) and line class codes). SWBT also provides usage information for billing exchange access and reciprocal compensation. SWBT's Sparks Aff. ¶¶ 103-106, 117-118. Therefore, the Commission finds that SWBT provides nondiscriminatory access to unbundled local switching in compliance with section 271(c)(2)(B)(vi).

(7) Checklist Item 7: Nondiscriminatory Access to 911, E911, Directory Assistance, and Operator Call Completion Services

911 and E911 Access

SWBT provides 911 and E911 access on a nondiscriminatory basis. See *generally* SWBT's Deere Aff.; and SWBT's Rogers Aff. There were no allegations that SWBT fails to satisfy this aspect of the checklist item.

Directory Assistance/Operator Services

Section 271(c)(2)(B)(vii)(II) and section 271(c)(2)(B)(vii)(III) require SWBT to provide nondiscriminatory access to "directory assistance services to allow the other carrier's customers to obtain telephone numbers" and "operator call completion services."

At the November question and answer session, no CLEC presented any evidence questioning SWBT's ability to satisfy this checklist item. The Commission finds that SWBT provides nondiscriminatory access to directory assistance and operator services in compliance with the requirements of section 271(c)(2)(B)(vii)(II) and (III). See *generally*, SWBT's Deere Aff.; and SWBT's Rogers Aff.

(8) Checklist Item 8: White Pages Directory Listings

SWBT provides White Pages directories to CLECs' end users during the annual distribution of new books and provides additional directories for CLECs to use throughout the year. See, SWBT's Rogers Reply Aff. ¶ 30. The M2A includes provisions for a facilities-based CLEC to forecast – before directories are printed – the total number of SWBT White Pages directories the CLEC will need throughout the year, just as SWBT must project its own needs. *Id.* If a CLEC wants White Pages provisions that are different from those available under the M2A, the CLEC is free to negotiate those terms and conditions in an interconnection agreement under section 252. No CLEC has alleged that SWBT fails to satisfy this aspect of the checklist item. Therefore, the Commission finds that SWBT provides adequate White Pages directory listings in compliance with section 271(c)(2)(B)(viii).

(9) Checklist Item 9: Nondiscriminatory Access to Telephone Numbers

Based on SWBT's testimony, the Commission finds that SWBT administered the assignment of numbers in accordance with industry-established guidelines published by the Industry Numbering Committee throughout its tenure as Code Administrator. Since that time SWBT has continued to support and to adhere to the number administration rules, regulations, and guidelines established by the FCC as well as the industry numbering forums. See SWBT's Adair Aff. ¶¶ 3-18.

WorldCom's assertion that the current practice of assigning NXXs to each exchange is a "gross misuse" of the numbering resource fails to recognize the basic requirements of the North American Numbering Plan (NANP) architecture. Unique NXXs (or unique NXX-X in a K Block pooling environment) are necessary for all providers to ensure proper routing and billing of calls placed to numbers to the dialed NPA-NXX. The requirement in the M2A mirrors this practice.

(10) Checklist Item 10: Nondiscriminatory Access to Databases and Associated Signaling Necessary for Call Routing and Completion

Section 271(c)(2)(B)(x) requires SWBT to provide "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."

Calling name database (CNAM) query responses deliver calling name information in conjunction with the calling parties' telephone numbers as part of Caller ID service. The information contained in the CNAM is available to CLEC end office switches on a query-by-query basis, together with the associated signaling. WorldCom has proposed that SWBT be required to make the entire contents of its CNAM available to CLECs in bulk, rather than on a per query basis. See WorldCom's Comments at 28. However, the information is being made available to CLECs in the same manner as it is available to SWBT's end office switches. See SWBT's Rogers Reply Aff. ¶¶ 20-21.

WorldCom also claims that SWBT's local service request (LSR) process for updating CLECs' line information database (LIDB) is inadequate. WorldCom's Comments at 25-28; WorldCom's Post Oct. Hearing Comments at 4. But the processes currently in place for updating LIDB records were implemented at the express request of WorldCom and other CLECs as a part of the Texas 271 collaborative process. SWBT implemented a mechanized process to allow CLECs

to update the LIDB database via the LSR on initial UNE switch port conversions, which was expected to be available December 31, 2000. See SWBT's Rogers Reply Aff. ¶¶ 23-24; SWBT's Post Oct. Hearing Reply Br. at 54-57; SWBT's Rogers Post Oct. Hearing Reply Aff. ¶¶ 6-11.

AT&T claims that SWBT does not offer nondiscriminatory access to its LIDB. AT&T's Post Oct. Hearing Comments at 40. Specifically, AT&T is concerned that SWBT's LSR does not provide the option to transition LIDB records "as is" on a UNE conversion or the ability to specify individual fields of data that a customer may want to modify. *Id.* at 41. SWBT is implementing a mechanized process for updating its LIDB via LSR that adequately address AT&T's concerns. SWBT's Rogers Reply Aff. ¶¶ 23-24; SWBT's Post Oct. Hearing Reply Br. at 54-57; SWBT's Rogers Post Oct. Hearing Reply Aff. ¶¶ 6-11. The new process is designed to create a more complete and accurate customer record via the LSR, which will benefit CLECs (like AT&T) and their customers by getting rid of any factors that cause error and delay. SWBT's Post Oct. Hearing Reply Br. at 56.

WorldCom alleges that there are mismatches between information on SWBT's LIDB database and WorldCom's customers' accounts that impact WorldCom customers' ability to make third-party or collect calls. See, WorldCom's Post Oct. Hearing Comments at 3. However, SWBT presented convincing evidence that the carrier accessing WorldCom subscriber LIDB information makes the decision whether to complete a third-party billed or collect call. See, SWBT's Post Oct. Hearing Br. at 53-54; SWBT's Rogers Post Oct. Hearing Reply Aff. ¶¶ 4-5. There is no call blocking feature or capability in LIDB. See, SWBT's Rogers Post Oct. Hearing Reply Aff. ¶¶ 4-5.

As noted by WorldCom, the information contained in the LIDB database for the subscribers in question was correct. See, WorldCom's Post Oct. Hearing Comments at 3. Not all carriers, however, choose to access LIDB information prior to processing or rejecting a call. SWBT's Rogers Post Oct. Hearing Reply Aff. ¶ 4. Furthermore, a carrier that does access SWBT's LIDB can make any decision regarding call processing or call rejection, based on that carrier's own business plans and requirements. SWBT's Post Oct. Hearing Reply Comments at 54. The Commission determines that this is a problem between WorldCom's end user and a third party carrier other than SWBT, and therefore, it does not affect SWBT's compliance with this checklist item.

At the November 8-9 question and answer session, no CLEC presented evidence questioning SWBT's ability to satisfy this checklist item.

The Commission finds that the concerns raised have been adequately addressed by SWBT. The Commission further finds that SWBT has shown it provides "nondiscriminatory access to databases and associated signaling necessary for call routing and completion."

(11) Checklist Item 11: Number Portability

SWBT has equipped 178 switches, representing 91 percent of its access lines in Missouri, with local number portability (LNP) capability. See Orozco Aff. ¶ 6. CLECs in Missouri served more than 124,000 ported access lines through April 2000. *Id.* SWBT has also provided detailed testimony of its procedures for ordering

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and provisioning LNP with and without unbundled loops. *Id.* ¶¶ 21-26; SWBT's Lawson Aff. ¶¶ 106, 111, 146-155.

AT&T has criticized SWBT's failure to meet some performance benchmarks related to LNP. See AT&T's Fettig Test. at 62. However, in one case – premature disconnection of LNP only orders – SWBT apparently misreported data because of programming errors. SWBT's Dysart Reply Aff. ¶ 87. SWBT has shown a consistent pattern of satisfying the performance benchmark. See *id.* ¶¶ 86-93.

Prior to implementing LNP, SWBT made interim number portability (INP) available. SWBT still provides INP in those few instances where LNP is not available. See SWBT's Deere Aff. ¶¶ 209-215.

SWBT provides CLECs a choice of two forms of INP: Remote Call Forwarding or Direct Inward Dialing. SWBT also makes available the Route Index Portability Hub method and the Directory Number Route Index method to any CLEC that requests them, subject to the requesting CLEC's payment of reasonable costs. *Id.*; M2A Attach. 14 – Interim Number Portability §§ 5.1-5.4, 7.1. No CLEC has criticized SWBT's INP performance.

(12) Checklist Item 12: Local Dialing Parity

Section 271(c)(2)(B)(xii) requires SWBT to provide nondiscriminatory access to “services or information” necessary to allow CLECs to implement local dialing parity in accordance with section 251(b)(3). SWBT provides such access to CLECs through its Commission-approved interconnection agreements. See SWBT's Deere Aff. ¶¶ 216-219.

Gabriel contends that SWBT's Metropolitan Calling Area (MCA) plan violates the dialing parity requirement by requiring SWBT's customers to dial a toll number when calling CLEC customers within the geographic area of the MCA. Gabriel's Cadieux Aff. ¶¶ 17-37; see also, Primary Network's Post Oct. Hearing Comments at 23 (claiming that SWBT's MCA plan is an issue for public-interest analysis); McLeodUSA's Post Oct. Hearing Comments at 15-18 (same).

In the intervening period after Gabriel made its complaint, the Commission issued an order which stated that CLECs were proper participants in MCA service on the same basis as ILECs. Report and Order, *Investigation Surrounding the Provisioning Metropolitan Calling Area Service*, Case No. TO-99-483 (MO PSC Sept. 7, 2000). Because Gabriel's contention was addressed by that order, those issues are now moot.

At the November 8-9 question and answer session, no other evidence was presented questioning SWBT's ability to provide CLECs the access necessary to satisfy this checklist item.

(13) Checklist Item 13: Reciprocal Compensation

The interconnection agreements between SWBT and various CLECs contain negotiated rates for reciprocal compensation. See, SWBT's Sparks Aff. ¶ 111.

In addition, the Commission has established rates for transport and termination in its Final Arbitration Order, Case Nos. TO-97-40, *et al.* (MO PSC July 31, 1997).

Under the M2A, SWBT offers three options with respect to reciprocal compensation. First, a CLEC may select a bill and keep arrangement with respect to local traffic and a meet-point-billing arrangement for Internet-bound traffic. Second, a CLEC may negotiate and, if necessary, arbitrate a compensation arrangement; in that event, bill and keep will serve as an interim arrangement, subject to true up. Third, the CLEC may choose to be paid reciprocal compensation on local traffic at the rates set by the Commission. See, T.2332-38 (SWBT's Sparks).

Primary and McLeodUSA each argued that SWBT is failing to make timely reciprocal compensation payments in Missouri for internet-bound traffic and MCA calls. See, Primary Network's Post Oct. Hearing Comments at 21; McLeodUSA's Post Oct. Hearing Comments at 15-16. However, the Commission has addressed the MCA calls in Case No. TO-99-483 and Primary's complaint in Case No. TC-2000-225, et al., has been dismissed.

Therefore, the Commission finds that there has been no evidence presented that SWBT is currently failing to make timely reciprocal compensation payments.

(14) Checklist Item 14: Resale

The Commission has established a wholesale discount rate of 19.2 percent applicable to all services except operator services and 13.9 percent for operator services.²⁸ See, SWBT's Ries Aff. ¶ 39. These discounts have been incorporated into the M2A.²⁹ See, SWBT's Br. at 107-09; see also *1997 Final Arbitration Order* at 3.

The telecommunications services that SWBT provides CLECs for resale are identical to the services that SWBT furnishes its own retail customers. See, SWBT's Sparks Aff. ¶ 121. CLECs are able to sell these services to the same customer groups and in the same manner as SWBT. *Id.* SWBT offers wholesale discounts on promotional offerings lasting more than 90 days. *Id.* ¶ 125; M2A Attach. 1 – Resale, § 4.2.

For retail services that SWBT offers to a limited group of customers (such as grandfathered services), SWBT allows resale to the same group of customers to which it sells the services, in accordance with 47 C.F.R. § 51.615. See, SWBT's Sparks Aff. ¶ 128. SWBT's customer-specific proposals are also available for resale to similarly situated customers without triggering termination liability charges or transfer fees to the end user. *Id.* ¶ 128; M2A Attach. 1 – Resale, App. Services/Pricing § 16.0. In addition, SWBT's OSS allow resellers to access pre ordering, ordering, provisioning, maintenance and repair, and billing functions for resold services in a nondiscriminatory manner. See, SWBT's Dysart Aff. ¶¶ 149-163, Tables 3, 4.

B. CONCLUSIONS OF LAW

General Matters

The 14-point competitive checklist sets out the steps that a BOC must take to open the local market to its competitors. See 47 U.S.C. § 271(c)(2)(B)(i)-(xiv).

²⁸ 1997 Final Arbitration Order at 3.

²⁹ M2A, Attach. 1, Services/Pricing App. § 14.1 (Resale).

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SWBT has satisfied the requirements of the competitive checklist by providing or offering access to and interconnection with its network on terms and conditions that satisfy each of the checklist items.

The standard for reviewing SWBT's compliance with the checklist is nondiscriminatory access to facilities and services. The standard is not performance free from error or mistake. Like the FCC, the Commission concludes "that isolated problems are [not] sufficient to demonstrate that [a BOC] fails to meet the statutory requirements."³⁰

Consistent with the position of the FCC, the Commission does not require that SWBT actually provision each specific checklist item, only that it demonstrate that each checklist item is legally and practically available. *Michigan Order*, 12 FCC Rcd at 20605, ¶ 115.

The Commission finds that SWBT is offering all 14 checklist items to CLECs in Missouri for their commercial use, even though CLECs are not yet ordering all these items at commercial volumes.

SWBT's general processes for collecting and reporting data were validated by Telcordia, which confirmed that SWBT "collects and reports data in a manner consistent with the [Texas Commission]-approved business rules," and that SWBT had agreed to implement each of Telcordia's recommendations. *Texas Order* ¶ 429. Therefore, the Commission concludes that a second, redundant review of those procedures is unnecessary.

The Commission has taken very seriously, however, all claims that SWBT's data are unreliable, or that they reveal sub-standard performance. Accordingly, following the FCC's lead, "[w]here particular SWBT data are disputed by commenters," those challenges are discussed in our checklist analysis. *Texas Order* ¶ 57.

(1) Checklist Item 1: Interconnection

The Commission has found that SWBT interconnects with CLECs using the same facilities, interfaces, technical criteria and service standards as it uses for its own operations. The FCC found that SWBT interconnects with CLECs using the same facilities, interfaces, technical criteria, and service standards as SWBT uses for its own operations in the state of Texas. The Commission finds that SWBT uses virtually identical facilities, interfaces, technical criteria and service standards in Missouri as it does in Texas. See SWBT's Deere Aff. ¶¶ 13-41 (methods of interconnection), 32-41 (trunking arrangements), 42-60 (trunk forecasting and servicing); SWBT's Sparks Aff. ¶¶ 32-72 (collocation); see also *Texas Order* ¶¶ 65, 73.

The Commission concludes that by offering the prices, terms, and conditions in the M2A on an interim basis subject to a limited true up, pending establishment of permanent collocation tariffs in the Commission's Case No. TT-2001-298, SWBT has provided "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(i).

³⁰ Memorandum Opinion and Order, *Application of BellSouth Corp., BellSouth Telecomms., Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20651, ¶ 78 (1998) ("Second Louisiana Order").

Interconnection Trunking

In the *Texas Order*, the FCC held that SWBT's provision of "parity or better performance to competitors" in Texas under PM 73 satisfied section 271. *Texas Order* ¶ 70. "Nothing in the statute requires the ILECs to provide superior quality interconnection to its competitors." *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000) (reaffirming prior invalidation of FCC rules requiring interconnection superior to that which the ILEC provides to itself), *petitions for cert. filed*, Nos. 00-511, 00-555, 00-587, 00-590, and 00-602. Thus, the Commission concludes that for purposes of compliance with section 271, where there is a retail analog (as here), SWBT's obligation is to provide parity performance and not performance satisfying a benchmark set higher than the service it provides to itself.³¹

The Commission also finds that to the extent SWBT fails in the future to meet the new benchmark standard in Version 1.7, SWBT will pay the highest levels of liquidated damages to CLECs and assessments to the state treasury, which provides ample incentive for SWBT to meet the benchmark. See SWBT's Dysart Reply Aff. ¶ 43; SWBT's Dysart Post Nov. Hearing Aff. ¶ 36.³²

AT&T presents no evidence on whether SWBT's trunk blockage measure (PM 70) actually reflects CLEC experience, and the FCC is clear that such unsupported allegations in this context should be flatly rejected:

In the future, if competitive LECs allege that blocking is occurring on outgoing calls from the competitive LEC network to the BOC network, and that such blockage is not being captured by the state-approved performance measure, then competitive LECs should provide evidence, such as reliable performance data, along with a showing of why the BOC is responsible for the blockage.

Texas Order ¶ 69; see also *AT&T Corp.*, 220 F.3d at 628 (rejecting AT&T's suggestion that "attributing [hot cut] outages of unknown origin to Bell Atlantic follow[s] automatically from the proposition that the company has the burden of proof").

AT&T's claim that SWBT has reported excessive blocking to TCG in the St. Louis market under PM 70 in June and July 2000, which was isolated and has now been corrected, is insufficient to deny approval of this Application. AT&T's Fettig Test. (Perf. Meas.) at 30. SWBT's performance for the purpose of section 271 compli-

³¹ See *AT&T Corp. v. FCC*, 220 F.3d 607, 625 (D.C. Cir. 2000) (explaining that, where there is a retail analog, the FCC in reviewing a section 271 application "asks whether the BOC has 'provide[d] access that is equal to . . . the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness'" (citation omitted; alteration in original); see also 47 C.F.R. § 51.305(a)(3)).

³² Nonetheless, in response to the concerns raised at the November 8-9 hearings and by Staff's November 2, 2000 comments, SWBT has begun an analysis of potential measures that it can implement to provision interconnection trunks for both CLECs and itself in a more timely manner, which it claims will lead to SWBT improving its reported performance under the very rigorous 95 percent benchmark standard contained in Version 1.7 of the PM Business Rules. See SWBT's Dysart Post Nov. Hearing Aff. ¶ 35; SWBT's Smith Post Nov. Hearing Aff. ¶¶ 7-10.

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ance is to be measured by its aggregate performance to all CLECs statewide, not, as AT&T suggests, CLEC by CLEC. SWBT met or exceeded the benchmark for PM 70 for all Missouri CLECs in the 12-month period from November 1999 through October 2000. See SWBT's Dysart Post Nov. Hearing Aff. ¶ 34. As the FCC has explained, one CLEC's experience regarding trunk blockage "do[es] not disprove the submitted data showing that SWBT met the benchmark on the trunk blocking performance measure (PM 70)." *Texas Order* ¶ 69 n.142; cf. *AT&T Corp.*, 220 F.3d at 624 (upholding FCC's determination that a BOC's compliance with checklist item (iv) (unbundled local loops) should be determined in the aggregate rather than on a loop-by-loop basis).³³

The Commission finds that the language in the M2A providing the option for a CLEC to interconnect at a single, technically feasible point within the LATA, tailored to meet the CLEC's need, fully complies with the FCC's requirement that "a competitive LEC ha[ve] the option to interconnect at only one technically feasible point in each LATA." *Texas Order* ¶ 78. See Attachment 11: Network Interconnection Architecture.

AT&T argues that requiring a CLEC to pay the cost of interconnection when the traffic must be transported from one local exchange to another local exchange within the same LATA will deny interconnection at a single point within a LATA. SWBT replies that due to the large size of the few LATAs in Missouri, the CLEC's point of interconnection could well be hundreds of miles from the local exchange where the calling and called parties are located. SWBT also argues that the Commission should find that AT&T's proposal is inconsistent with federal law because it would improperly shift the cost of transport and termination to SWBT where the CLEC's chosen single point of interconnection is in one local exchange (or local calling area), and the calling and called parties are in another. The FCC has stated, however, that it has not "consider[ed] the issue of how the choice of interconnection would affect inter carrier compensation arrangements."³⁴ The FCC further stated that "[t]o the extent that the parties believe that this is a matter requiring more explicit rules, . . . [the parties are invited] to file a petition for declaratory ruling or petition for rulemaking with the . . . [FCC]." *Id.* at ¶ 233.

To the extent that the parties have raised the issue of the relationship between single point of interconnection and reciprocal compensation, the Commission determines that this issue is not appropriately decided in the context of section 271 compliance. Based on the findings of fact above, and that only AT&T finds that there

³³ The Commission also finds little significance in the possible discrepancy under PM 74 (Average Delay Days for Missed Due Dates – Interconnection Trunks), where SWBT may be erroneously charged delay days because it is initially not ready to meet a due date and the CLEC subsequently is not ready to accept the order when SWBT becomes ready to fill it. These additional CLEC-caused delay days should not be charged to SWBT, which states that it is attempting to modify its Work Force Administration system correctly to capture this information in the future under PM 74. SWBT's Dysart Post Nov. Hearing Aff. ¶ 36.

³⁴ Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., SWBT, and Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, FCC CC Docket No. 00-217, Rel. Jan. 22, 2001, ¶ 234.

is still an issue on this point, SWBT has demonstrated that it provides interconnection at any single, technically feasible point within a LATA in compliance with 251(c)(2).

(2) Checklist Item 2: Nondiscriminatory Access to Network Elements

Section 271(c)(2)(B) requires SWBT to provide “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).”

In addition, the FCC has issued guidance in its *UNE Remand Order*.

Access to UNEs Generally

Section 271(c)(2)(B)(ii) requires SWBT to offer nondiscriminatory access to network elements. See 47 U.S.C. § 271(c)(2)(B)(ii).

Based on the findings of fact set out above, the Commission concludes that SWBT provides nondiscriminatory access to UNEs at any technically feasible point under just and reasonable rates, terms, and conditions, and at cost-based rates, as required by the Act. See 47 U.S.C. §§ 251(c)(3), 252(d)(1); See also, *Texas Order* ¶ 214.

UNE Combinations

Section 251(c)(3) requires that SWBT provide nondiscriminatory access to UNEs under section 251(c)(3), including the requirement that it provide UNEs “in a manner that allows requesting carriers to combine such elements in order to provide [a] telecommunications service.” 47 U.S.C. § 251(c)(3).

The FCC has emphasized that the ability of requesting carriers to use combinations of UNEs is “integral to achieving Congress’ objective of promoting competition in local telecommunications markets.” *Texas Order* ¶ 215.

ASCENT made an objection to SWBT’s proposed secured frame option. See Response of ASCENT to SWBT’s Updated Record, page 18. The FCC approved, however, this identical offering in the T2A, and concluded that SWBT “provides access to UNEs in a manner that allows requesting carriers to combine” network elements. *Texas Order* ¶¶ 216-217. The M2A’s UNE combination provisions mirror those contained in the T2A. Therefore, the Commission rejects ASCENT’s objection.

The Commission also rejects AT&T’s claim that “the Act should be construed to require SWBT to combine elements for CLECs” or to do so based on TELRIC rates. AT&T’s Comments at 18; AT&T’s Post Oct. Hearing Comments at 17. The Commission also rejects requests to extend the period during which the UNE-P is offered or to extend the voluntary commitment to provide the EEL. See, e.g., Birch’s Tidwell Test. at 11-15; WorldCom’s Comments at 29-33. As the Eighth Circuit recently reaffirmed, such a requirement would be unlawful. The Eighth Circuit held that

Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall “combine such elements.” It is

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not the duty of the ILECs to “perform the functions necessary to combine unbundled network elements in any manner.”

Iowa Utils. Bd., 219 F.3d at 759. Thus, SWBT is not required to perform these UNE combinations and the Commission cannot impose a TELRIC price for this voluntary offering. See, *Texas Order* ¶ 235; SWBT’s Sparks Reply Aff. ¶¶ 32-33.

The Commission concludes that the limitations that SWBT places on the EEL are wholly consistent with the recent findings of the FCC in its *UNE Remand Supplemental Order*³⁵ and its *UNE Remand Supplemental Order Clarification*³⁶ regarding the use of network elements to provide access services. The Commission therefore rejects the proposed modifications to the EEL of Birch and WorldCom. See also, *Texas Order* ¶ 227.

The Commission also disagrees with IP Communication’s assertion that the *UNE Remand Order* does not prevent IP Communication from connecting unbundled dedicated transport services. IP Communication’s argument is incorrect under the *UNE Remand Supplemental Order Clarification*’s provisions for when carriers may convert existing special access services to network elements. See, SWBT’s Sparks Reply Aff. ¶ 42.

The Commission also rejects ASCENT’s objection to section 14.3.3 of the UNE attachment. See ASCENT’s Comments at 17. As Ms. Sparks testified, the M2A provision, like its counterpart provision in the T2A, simply notes when SWBT may elect not to perform the work of combining UNEs that are not already combined. One of the triggers is the presence of four or more collocators in a central office. See SWBT’s Sparks Reply Aff. ¶ 46. Again, this trigger is fully consistent with the Act, which does not require SWBT to combine UNEs that are not already combined. Moreover, if SWBT elects not to combine in that office, each collocator – whether the first, fifth, tenth, etc. – has the same requirements and rights. *Id.*

The Commission finds that SWBT’s offerings enable CLECs themselves to combine UNEs in compliance with section 251(c)(3). See SWBT’s Deere Aff. ¶¶ 67, 140-154; SWBT’s Sparks Aff. ¶¶ 33-34, 91; see also M2A Attach. 6 – UNE.

Line Sharing

The record shows that SWBT was in compliance with the *Line Sharing Order* on May 29, 2000 – one week in advance of the FCC’s implementation date. SWBT’s Chapman Aff. ¶ 53.

The prices, terms, and conditions for SWBT’s line sharing in the M2A are subject to a limited true up with permanent prices, terms, and conditions set in the Commission’s Case No. TT-2001-440. The Commission concludes that with the optional appendix for line sharing in the M2A, SWBT is in full compliance with the FCC’s *Line Sharing Order*.

³⁵ Supplemental Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 1760 (1999) (“*UNE Remand Supplemental Order*”).

³⁶ Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) (“*UNE Remand Supplemental Order Clarification*”).

The Commission will also establish permanent prices, terms, and conditions for line splitting in Case No. TO-2001-440. In the interim, the line splitting appendix to the M2A provides for line splitting in Missouri at the same prices, terms, and conditions as in the state of Texas.

Intellectual Property

AT&T argues that “SWBT should indemnify CLECs using UNEs in the same manner as SWBT from infringement claims by SWBT’s vendors.” AT&T’s Comments at 9; see also AT&T’s Kohly Test. at 51; T.2480 (AT&T’s Kohly). The FCC has held, however, that “the *Intellectual Property Order* did not require that incumbent LECs indemnify competitive LECs for any intellectual property liability associated with their use of UNEs, and the Commission does not find that unwillingness to provide such indemnification would necessarily constitute a violation of the Act.” *Texas Order* ¶ 230. Rather, the FCC held that “[a]ll that the nondiscrimination principle requires in this context is that the incumbent LEC utilize its best efforts to obtain coextensive third party intellectual property rights for competitive LECs in the use of unbundled network elements.” *Id.*

The SBC Telecom, Inc./Bell Atlantic-New York agreement provides no basis for departing from the FCC’s conclusion in the *Texas Order* to reject the indemnification language requested by AT&T. Therefore, the Commission rejects AT&T’s argument.

The Commission further concludes that SWBT fully complies with the best-efforts test. See SWBT’s Palmer Reply Aff. ¶¶ 5-12. The Commission finds that SWBT’s commitment in section 7.3 of the M2A to use its “best efforts” on behalf of CLECs satisfies the FCC’s *Intellectual Property Order* and *Texas Order*.

The Commission also concludes that SWBT can not be required to seek a franchise under Missouri law, because it has a pre existing statewide franchise granted by the State prior to the passage of the statutes giving municipalities the right to seek franchise agreements. T.2770 (SWBT’s Lane). Federal courts have recognized that a preexisting statewide franchise is a bar to collection of additional municipal fees under a purported franchise requirement and that this bar does not unlawfully discriminate against CLECs in contravention of the Act. See, e.g., *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785 (E.D. Mich. 1998), *aff’d*, 206 F.3d 618 (6th Cir. 2000).

Pricing

Some participants in this proceeding, requested that the Commission require Texas pricing in every instance in the M2A. See, e.g., OPC’s Post Oct. Hearing Comments at 3; Primary Network’s Post Oct. Hearing Comments at 11.

The rates for UNEs in Missouri set in Case No. TO-97-40 are appropriately based on Missouri costs, and the Commission finds the proposal to utilize Texas rates in lieu of Commission-approved TELRIC rates in Missouri to be unreasonable. Prices for most of the network elements that are actually used in volumes by CLECs were established by the Commission in the AT&T arbitrations (Case Nos. TO-97-40, *et al.* and TO-98-115), and in the DSL arbitrations with BroadSpan (Case No. TO-99-370), Sprint (Case No. TO-99-461) and Covad (Case No. TO-2000-322).

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Based on the findings of fact set out above, the Commission also concludes that the non recurring rates in the M2A are consistent with TELRIC.

The Commission further concludes that the interim rates in the M2A based on Texas rates, are also TELRIC-compliant. Furthermore, the Commission has committed to entering orders establishing permanent rates as soon as possible in cases already established.

The Commission concludes that SWBT's proposed pricing in the M2A complies in all respects with section 252(d)(1)(A).

Nondiscriminatory Access to OSS

The Act requires SWBT to show that it has developed electronic and manual interfaces that allow CLECs to access all of the OSS functions required by the FCC in a nondiscriminatory manner. See *Texas Order* ¶ 92. The Commission has investigated whether SWBT has "deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them," as well as whether these systems are ready, as a practical matter. *Id.* ¶ 96.

In view of the factual finding that SWBT provides CLECs serving customers in Missouri with the same OSS that it offers throughout its five-state region, the Commission concludes that it is wholly appropriate for it to take into account the record developed in Texas, as well as those developed in Oklahoma and Kansas, where the state commissions similarly found that SWBT's OSS are regional.³⁷

While SWBT's OSS performance is not perfect, it is generally at parity with SWBT's own retail services or the applicable Texas Commission-established benchmarks and offers an efficient carrier a meaningful opportunity to compete. See *id.* ¶¶ 94-96, 99.

The Commission finds that SWBT's CMP in Missouri, which was developed in collaboration with CLECs under the supervision of the Texas Commission, verified by Telcordia, and approved by the FCC in Texas, offers an efficient carrier a meaningful opportunity to compete. See SWBT's Lawson Aff. ¶¶ 353-415; SWBT's Lawson Reply Aff. ¶¶ 25-26; *Texas Order* ¶ 110. The Commission acknowledges the claims made by CLEC commenters (see, e.g., AT&T's Willard Test. at 12-18; WorldCom's Comments at 6); the Commission concurs, however, with the assessment of the FCC that SWBT's CMP is effective and "affords competing carriers a meaningful opportunity to compete." *Texas Order* ¶ 118.

³⁷ See also Memorandum Opinion and Order, *Application by BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana*, 13 FCC Rcd 6245, 6258, ¶ 21 (1998) ("First Louisiana Order") (using the findings of the Memorandum Opinion and Order, *Application of BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, 13 FCC Rcd 539 (1997) ("South Carolina Order"), as a starting point for examining the same OSS in Louisiana); Second Louisiana Order, 13 FCC Rcd at 20637-38, ¶ 56, 20655, ¶ 86 (same).

None of the individual allegations raised by various commenters, all of which have been fully rebutted by SWBT's witnesses, detracts from this finding. See SWBT's Lawson Reply Aff. ¶¶ 27-43. The Commission notes that, if future evidence comes to light that SWBT is failing to adhere to its agreed-upon CMP or has altered its testing environment so as to discriminate against competing carriers, the FCC has a range of enforcement options available to it under section 271(d)(6).

In the Texas proceeding, the FCC found that SWBT offers nondiscriminatory access to OSS pre ordering functions, and our examination of the record in this proceeding reaffirms that conclusion. See *Texas Order* ¶ 147.

Like the FCC in the Texas proceeding, the Commission's review of the data submitted leads it to conclude that "SWBT demonstrates that it provides nondiscriminatory access to its ordering systems in accordance with the requirements of section 271." *Id.* ¶ 169.

The Commission also finds that SWBT's reject provisioning affords CLECs a reasonable opportunity to compete. See *id.* ¶ 174.

The FCC considered the benchmark for PM 10.1 (Percentage of Manual Rejects Received Electronically and Returned in Five Hours) to be "strict" and concluded that "SWBT's ability to return manually-generated rejects in an average of five to eight hours provides efficient competing carriers a meaningful opportunity to compete, particularly in light of the fact that most rejects are mechanically-generated and are returned in under an hour." *Id.* ¶ 175. Because the mean time to return manual rejects has been significantly shorter in Missouri than the interval approved by the FCC in Texas, the Commission concludes that SWBT's performance is satisfactory and finds AT&T's complaint on this issue unpersuasive.

The Commission also has found that CLECs are afforded a reasonable opportunity to compete through SWBT's return of service order completions. See SWBT's Noland Reply Aff. ¶¶ 33-34, 37; *Texas Order* ¶¶ 187-188. The Commission concludes that SWBT provides jeopardy notifications to competing carriers in a nondiscriminatory manner. See SWBT's Noland Reply Aff. ¶ 36; *Texas Order* ¶¶ 184-185.

The integration of electronic ordering and pre-ordering functions with CLECs' back-end systems has been of special concern to the FCC.³⁸ The FCC has concluded that SWBT's "application-to-application interfaces allow competing carriers to integrate successfully pre-ordering information obtained from the DataGate interface into the ordering process and the carriers' back office systems." *Texas Order* ¶ 152. In light of the evidence in the record and the absence of contrary claims by CLECs, the Commission agrees with the FCC's conclusion that DataGate can be integrated with SWBT's EDI ordering gateway as well as with the CLECs' own back end systems. See *id.*

Based on the Commission's review of the evidence and the absence of complaints from CLECs, including performance data and the few CLEC comments

³⁸ See *New York Order*, 15 FCC Rcd at 4019-20, ¶ 137; *Second Louisiana Order*, 13 FCC Rcd at 20661-67, ¶¶ 96-103; *First Louisiana Order*, 13 FCC Rcd at 6275-79, ¶¶ 49-55; *South Carolina Order*, 13 FCC Rcd at 602, ¶ 112, 621-29, ¶¶ 152-166.

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on maintenance and repair matters, the Commission concludes that SWBT provides nondiscriminatory access to maintenance and repair OSS functions. *See id.* ¶¶ 201-209.

The evidence of double billing is insufficient to call into question the Commission's conclusion that SWBT's billing processes and procedures are nondiscriminatory. *See id.* ¶ 192.

Based on the record established in this docket, including current commercial usage data and the results of the third-party test in Texas of SWBT's OSS, the Commission finds that SWBT has shown by a preponderance of the evidence that it continues to offer nondiscriminatory access to its OSS, in keeping with the FCC's finding in the *Texas Order*. *See id.* ¶ 99.

(3) Checklist Item 3: Nondiscriminatory Access to Poles, Ducts, Conduits, and Rights-of-Way

Section 271(c)(2)(B)(iii) requires a BOC to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way at "just and reasonable rates." 47 U.S.C. § 271(c)(2)(B)(iii); *see Texas Order* ¶ 245.

SWBT provided evidence of its provision of access to poles, duct, conduits, and rights-of-way. No CLEC has challenged SWBT's compliance with this checklist item. Based on its findings of fact set out above, the Commission finds that SWBT offers nondiscriminatory access to poles, ducts, conduits, and rights-of-way in compliance with the requirements of section 271(c)(2)(B)(iii).

(4) Checklist Item 4: Local Loops

Section 271(c)(2)(B)(iv) requires SWBT to provide or offer access to "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." Based on the findings of fact set out above, the Commission concludes that SWBT provides nondiscriminatory access to all of the "features, functions, and capabilities of the [local loop] transmission facilities, including dark fiber and attached electronics (except those used for the provision of advanced services, such as DSLAMs) owned by the incumbent LEC, between an incumbent LEC's central office and the loop demarcation point at the customer premises." *UNE Remand Order*, 15 FCC Rcd at 3772, ¶ 167; *see* M2A Attach. 6 – UNE.

In offering to provide access to additional loop types and conditioning pursuant to the Special Request process, the Commission finds that SWBT satisfies the FCC's requirement that "[a] BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested." *Second Louisiana Order*, 13 FCC Rcd at 20713, ¶ 187.

The Commission concurs with the FCC that the new "outages on conversion" performance measurement developed during the Texas six-month review that SWBT began reporting in October 2000 "will be a useful, standardized way for competing carriers to assess FDT and CHC outage rates in the future." *See Texas Order* ¶ 273. In the *Texas Order*, however, the FCC found that SWBT could demonstrate nondiscriminatory access to hot cut loops despite the absence of a performance measurement that captures outages during coordinated conver-

sions. Instead, the FCC, as does this Commission, relied upon the results of data reconciliation by the SWBT/AT&T Performance Process Improvement Group (PPIG). See *Texas Order* ¶¶ 268-273.

The Commission concludes that SWBT provides nondiscriminatory access to xDSL-capable loops and related services, in full satisfaction of all obligations under the *Line Sharing Order* and the *UNE Remand Order*.

SWBT's on-time hot-cut performance for both CHC and FDT surpasses the 90-percent benchmark established by the FCC in the New York and Texas proceedings. See *New York Order*, 15 FCC Rcd at 4121-22, ¶ 329; *Texas Order* ¶ 264.

SWBT meets the 5-percent benchmark for outages during conversion for both CHC and FDT cuts.

SWBT satisfies the FCC's 2-percent standard for I-7 trouble reports. See SWBT's D. Smith Reply Aff. ¶¶ 8-26; SWBT's Noland Aff. ¶¶ 101-108.

The Commission finds that although participation by IP Communications and Primary Networks in SWBT's "Yellow Zone" trial should alleviate their provisioning concerns, these concerns are not, in any case, sufficient to undermine the conclusion that SWBT satisfies this checklist item. The FCC has repeatedly held that, "where a retail analogue exists, a BOC must provide access that is equal to (i.e., substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness." *Texas Order* ¶ 44; see also *New York Order*, 15 FCC Rcd at 3971-72, ¶ 44; T.2965-66, 2971 (SWBT's Chapman). The applicable standard is one of parity, not perfection. As explained in the *UNE Remand Order*, SWBT "must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to [itself]." 15 FCC Rcd at 3885, ¶ 427.

The FCC has already concluded that SWBT provides CLECs equivalent access to the same database that SWBT itself uses, and in the exact same time frame. See *Texas Order* ¶¶ 165-167. Nothing more is required under the *UNE Remand Order*, see 15 FCC Rcd at 3886, ¶ 429, or under the Act, see *Iowa Utils. Bd.*, 219 F.3d at 757-58 (superior quality rules violate the Act).

The Act does not require incumbent carriers to provide the high-frequency portion of the loop functionality to UNE Platform users. See *Line Sharing Order*, 14 FCC Rcd at 20947, ¶ 72; *Texas Order* ¶ 330; see also SWBT's Chapman Post Oct. Hearing Reply Aff.

SWBT's performance across available loop types demonstrates that SWBT provides nondiscriminatory access in compliance with this checklist item. See SWBT's Dysart Aff. Attach. A; SWBT's Dysart Reply Aff. Attach. A; SWBT's Joint Dysart, Noland, D. Smith Post Oct. Hearing Reply Aff. Attach. A; SWBT's Dysart Post Nov. Hearing Aff. Attachs. A C.

The M2A allows AT&T to engage in line splitting and meet all requirements for line splitting. SWBT allows CLECs to perform line splitting in Missouri in precisely the same manner as it does in Texas, with interim prices, terms, and conditions subject to a limited true up with permanent prices, terms, and conditions to be set in Case No. TO-2001-440.

(5) Checklist Item 5: Unbundled Local Transport

Section 271(c)(2)(B)(v) requires SWBT to offer local transport unbundled from switching or other services.

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Although the available data show very few months in which more than 10 data points were recorded, the Commission finds that SWBT's provisioning of transport to CLECs is nondiscriminatory. See SWBT's Dysart Reply Aff. Attach. A (PM 65-06); see also *Texas Order* ¶ 333.

Based on the findings of fact above, the Commission concludes that SWBT's dedicated and shared transport offerings satisfy the requirements of section 271(c)(2)(B)(v).

(6) Checklist Item 6: Unbundled Local Switching

Section 271(c)(2)(B)(vi) requires that Bell companies make available local switching unbundled from transport, local loops, and other services.

Based on the findings of fact above, the Commission concludes that SWBT provides nondiscriminatory access to unbundled local switching in compliance with the requirements of section 271(c)(2)(B)(vi).

(7) Checklist Item 7: Nondiscriminatory Access to 911, E911, Directory Assistance, and Operator Call Completion Services

Section 271(c)(2)(B)(vii) requires that SWBT offer: "Nondiscriminatory access to – (I) 911 and E911 services; (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and (III) operator call completion services."

Various CLECs claim that SWBT should be required to continue providing operator services and directory assistance services as unbundled network elements. See AT&T's Comments at 16; WorldCom's Comments at 29; Gabriel's Cadieux Aff. ¶¶ 41-44; NextLink's Comments at 25-26. But the FCC has now removed directory assistance and operator services from the list of required elements subject to the unbundling requirements of sections 251 and 252, including the requirement that rates be based on forward-looking costs. *UNE Remand Order*, 15 FCC Rcd at 3891-92, ¶¶ 441-442.

WorldCom suggests that SWBT should allow WorldCom to use subscriber list information obtained under section 251(b)(3) to publish directories. See WorldCom's Comments at 50. WorldCom may only obtain subscriber list information for publication purposes under an agreement it enters into with SWBT under 47 U.S.C. § 222(e).

Based on the findings of fact, the Commission concludes that SWBT has demonstrated that it is providing nondiscriminatory access to 911 and E911 services, directory assistance, and operator call completion services in compliance with section(c)(2)(B)(vii). See SWBT's Deere Aff. ¶¶ 155-186; and SWBT's Rogers Aff. ¶¶ 10-47.

(8) Checklist Item 8: White Pages Directory Listings

Section 271(c)(2)(B)(viii) requires SWBT to provide White Pages directory listings for customers of other carriers.

Based on the findings of fact set out above, the Commission concludes that SWBT provides White Pages directory listings in compliance with section 271(c)(2)(B)(viii).

(9) Checklist Item 9: Nondiscriminatory Access to Telephone Numbers

Section 271(c)(2)(B)(ix) requires SWBT to provide CLECs with nondiscriminatory access to telephone numbers for assignment to their customers, until telecommunications numbering administration guidelines, plans, or rules are established. SWBT provided evidence that it provides CLECs with nondiscriminatory access to telephone numbers for assignment to their customers. See *generally*, SWBT's Adair Aff. Therefore, the Commission finds that SWBT complies with section 271(c)(2)(B)(ix).

(10) Checklist Item 10: Nondiscriminatory Access to Databases and Associated Signaling Necessary for Call Routing and Completion

Section 271(c)(2)(B)(x) requires SWBT to provide "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion." The FCC has specifically stated:

In the Local Competition Order, the Commission determined that access to call-related databases was technically feasible, and concluded incumbent LECs must provide nondiscriminatory access to the call-related databases on an unbundled basis, for the purpose of switch query and database response through the SS7 network.

UNE Remand Order, 15 FCC Rcd at 3874, ¶ 400 (emphasis added).

Because bulk database downloads would specifically negate the switch query and database response aspect of CNAM and LIDB, WorldCom's proposal is completely without foundation. In its *Local Competition Order*, the FCC stated:

We require incumbent LECs to provide this access to their call-related databases by means of physical access at the STP linked to the unbundled database. . . . We, therefore, emphasize that access to call-related databases must be provided through interconnection at the STP and that we do not require direct access to call-related databases.

11 FCC Rcd at 15742, ¶¶ 484-485.³⁹

Thus, the FCC only requires access at the signaling transfer point. The Commission concludes that SWBT is not required to provide CLECs access to listing or other information contained in the CNAM database on a bulk basis.

Based on the findings of fact set out above, the Commission concludes that SWBT provides "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."

³⁹ See also, *UNE Remand Order*, 15 FCC Rcd at 3878, ¶ 410 ("[W]e require incumbent LECs to provide nondiscriminatory access to their call-related databases, including, but not limited to, the CNAM Database . . . by means of physical access at the signaling transfer point linked to the unbundled databases.").

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(11) Checklist Item 11: Number Portability

Section 271(c)(2)(B)(xi) requires compliance with FCC regulations regarding number portability.

The evidence submitted in this proceeding demonstrates that SWBT has complied with its obligations to implement both LNP and INP under the applicable FCC orders. See, SWBT's Dysart Aff. ¶¶ 81-84.

The Commission finds that SWBT's methods for providing INP, where required, comply with the FCC's requirements. Accordingly, the Commission concludes that SWBT has satisfied the INP obligations under section 271(c)(2)(B)(xi). See, SWBT's Deere Aff. ¶¶ 209-215.

(12) Checklist Item 12: Local Dialing Parity

Section 271(c)(2)(B)(xii) requires SWBT to provide "[n]ondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3)."

The FCC anticipated "that local dialing parity [would] be achieved upon implementation of the number portability and interconnection requirements of section 251." Second Report and Order and Memorandum Opinion and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 19392, 19430, ¶ 71 (1996). SWBT has successfully implemented local dialing parity in Missouri.

Based on the findings of fact set out above, the Commission concludes that SWBT provides nondiscriminatory access to services or information necessary to allow CLECs to implement local dialing parity in accordance with section 251(b)(3).

(13) Checklist Item 13: Reciprocal Compensation

Section 271(c)(2)(B)(xiii) requires that SWBT provide "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."

The FCC has made clear that the treatment of Internet-bound traffic for reciprocal compensation purposes will not be considered in evaluating checklist compliance, pending completion of federal proceedings on this issue. *Texas Order* ¶ 386. SWBT has complied with this Commission's order in Case No. TO-98-278, in which the Commission determined that it would defer to the FCC's resolution of this issue. See, SWBT's Sparks Aff. ¶¶ 109-110.

McLeodUSA criticizes the terms of a voluntary agreement between SWBT and Intermedia, but this has no effect on SWBT's obligation to pay reciprocal compensation on local traffic. McLeodUSA also claims that, if SWBT complies with the bill and keep methodology adopted by the Commission, then it will fail to comply with this checklist item. However, the Commission's order in Case No. TO-99-483 gives CLECs the option to participate in the MCA plan; CLEC participation is not mandatory.

Therefore, based on the findings of fact as set out above, the Commission finds that SWBT has satisfied the requirements of section 271(c)(2)(B)(xiii).

(14) Checklist Item 14: Resale

Section 271(c)(2)(B)(xiv) requires that SWBT make “[t]elecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).”

Based on the findings of fact set out above, the Commission concludes that SWBT offers its retail services for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

Therefore, the Commission finds that SWBT has satisfied the requirements under section 271(c)(2)(B)(xiv).

V. THE PUBLIC INTEREST**A. FINDINGS OF FACT**

Section 271(d)(3)(C) provides that the FCC shall not authorize a BOC to enter into the interLATA market unless it determines that “the requested authorization is consistent with the public interest, convenience, and necessity.”

In support of its argument that granting its Application in Missouri will serve the public interest, SWBT has presented testimony by economists Richard L. Schmalensee and Paul S. Brandon that SWBT’s entry into the long-distance market will benefit the public interest in Missouri by increasing competition in the provision of long-distance services. *See generally* SWBT’s Schmalensee & Brandon Aff.

AT&T and others disagree with some of SWBT’s claims regarding the magnitude of these benefits, *see, e.g.*, AT&T’s Kohly Test. at 25-30, but there is no serious dispute that SWBT’s entry into the long-distance market will likely help to drive the rates paid by residential and small-business consumers closer to the costs of providing service and increase consumer choice for long-distance services. *See* SWBT’s Schmalensee & Brandon Reply Aff. ¶ 11.

SWBT has no ability to impede long-distance competition by entering the interLATA market in Missouri. As the FCC has found, today’s accounting safeguards and price regulation make misallocation of interLATA costs to local services hard to accomplish and relatively easy to detect.⁴⁰ And any attempt to subsidize interLATA rates or to discriminate against competing long-distance carriers would be met with swift and stern action by the FCC.

SWBT’s entry into the interLATA market is likely to spur competition in the local exchange market as well. Once SWBT is able to offer bundled packages of local and long-distance service, all potential entrants will have to compete even more intensely for local business in Missouri. The FCC has acknowledged that the fear of losing long-distance profits to the BOC once it is able to be a one-stop provider

⁴⁰ See, e.g., Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, 12 FCC Rcd 15756, 15817, ¶ 105 (1997); Report and Order, Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, 11 FCC Rcd 17539, 17550-51, ¶ 25, 17586, ¶ 108 (1996).

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“would surely give long distance carriers an added incentive to enter the local market.”⁴¹

In addition to the effects of SWBT’s interLATA entry on local and long-distance competition, the FCC has indicated that it is particularly interested in “evidence that a BOC has agreed to performance monitoring (including performance standards and reporting requirements) in its interconnection agreements with new entrants” and “whether such performance monitoring includes appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards.”⁴²

SWBT has demonstrated in this record that it has in place performance measurements covering – among other things – OSS (including pre-ordering, ordering, provisioning, maintenance and repair, and billing), interconnection, access to UNEs, resold services, number portability, and directory and operator services. As noted above, these measurements were developed in a collaborative process involving CLECs and state and federal regulators, and they were approved by the FCC in Texas. See, *Texas Order* ¶ 425.

This Commission has adopted all changes to the performance measurements that were ordered by the Texas Commission in its recently completed six-month review process. See, SWBT’s *Dysart Reply Aff.* ¶¶ 11-18. This is significant, because adoption of these changes ensures that the Missouri market will benefit from the evolving nature of SWBT’s performance plan, which the FCC specifically identified as “an important feature.” *Texas Order* ¶ 425.

The proposed performance penalty plan is in all material respects a mirror image of the plan approved by the FCC in Texas.⁴³ The plan puts \$98 million at risk during the first year, which is precisely the same liability – measured as a percentage of net revenue – that is at risk in Texas. See *id.* ¶ 424 & n.1235. (It is also the same percentage that Bell Atlantic proposed, and the FCC approved, in New York.⁴⁴) Under the plan’s first tier, when SWBT fails to meet specified performance levels on specific measures, payments are made to affected CLECs in the form of liquidated damages under their interconnection agreements. Under the second tier, if substandard performance continues over a series of months, SWBT makes payments to the Missouri State Treasury.

⁴¹ *South Carolina Order*, 13 FCC Rcd at 552-53, ¶ 25; see also *id.* ¶ 25 n.45 (referring to the South Carolina PSC’s conclusion that allowing BellSouth into long distance “will create real incentives for the major [interexchange carriers] to enter the local market . . . , because they will no longer be able to pursue other opportunities secure in the knowledge that [BellSouth] cannot invade their market until they build substantial local facilities”).

⁴² *Second Louisiana Order*, 13 FCC Rcd at 20806, ¶¶ 363-364; see also, *Texas Order* ¶ 420; *New York Order*, 15 FCC Rcd at 4164-65, ¶ 429.

⁴³ See *Texas Order* ¶¶ 422-427. The Commission notes with approval that in response to Staff comments SWBT has removed from the M2A language providing that performance penalties awarded under the plan are the “sole and exclusive remedy” for SWBT’s failure to meet the standards and benchmarks included within the plan. See SWBT’s *Dysart Reply Aff.* ¶ 29.

⁴⁴ *New York Order*, 15 FCC Rcd at 4168, ¶ 436 n.1332.

B. CONCLUSIONS OF LAW

The Act does not require this Commission to make a recommendation to the FCC on the public interest consequences of SWBT's interLATA entry. See 47 U.S.C. § 271(d)(2)(B). Yet this Commission is uniquely situated to evaluate the probable effects of SWBT's potential entry into the interLATA market in Missouri. Having carefully considered the arguments on both sides of this issue, this Commission has concluded that a recommendation to the FCC is appropriate and that SWBT's interLATA entry would serve the public interest.

SWBT's entry into long distance will increase consumer choice and reduce long-distance prices, particularly for residential consumers. According to the FCC, "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist. As a general matter, [the FCC] believe[s] that additional competition in telecommunications markets will enhance the public interest."⁴⁵

Considered in light of the other factors that bear on SWBT's incentive to provide nondiscriminatory service, the Commission concludes that SWBT's performance penalty plan provides the necessary financial incentives for it to continue to provide access and interconnection that is nondiscriminatory and ensures CLECs in Missouri a meaningful opportunity to compete in the local market.

Approval of SWBT's Application to the FCC for interLATA relief in Missouri will be in the public interest

VI. SEPARATE AFFILIATE — SECTION 272

Section 271(d)(3)(B) of the Act requires that a BOC comply with the requirements of section 272, regarding separate affiliates, before being granted authority to provide interLATA services, by the FCC. A recommendation by this Commission to the FCC regarding SWBT's compliance with sections 271(d)(3)(B) and 272 is not necessary. SWBT has, however, provided evidence that it proposes the same standards for Missouri that were approved by the FCC for Texas. The Commission's Staff is of the opinion that SWBT complies with section 272. See, Staff's Responses to SWBT's Updated Record, filed Aug. 28, 2000. Because SWBT will operate under the same standards in Missouri with regard to its separate affiliate, as it has in Texas, the Commission concludes that SWBT complies with the requirements of section 272.

CONCLUSION

Based on the extensive record in this case, the availability of the M2A to Missouri CLECs, and the Commission's intention to expeditiously determine permanent rates, terms, and conditions for collocation, line sharing, line splitting, loop

⁴⁵ *New York Order*, 15 FCC Rcd at 4164, ¶ 428; see also *Texas Order* ¶ 416; *Michigan Order*, 12 FCC Rcd at 20741-42, ¶ 381 ("BOC entry into the long distance market will further Congress' objectives of promoting competition and deregulation of telecommunication markets."); see also *Memorandum Opinion and Order, Application of 360° Communications Co., Transferor, and ALLTEL Corp., Transferee, for Consent to Transfer Control of 360° Communications Co. and Affiliates*, 14 FCC Rcd 2005, 2017, ¶ 26 (1998).

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conditioning, and unbundled network elements, the Commission concludes that facilities-based local competition exists in Missouri for both business and residential customers; that SWBT is providing competing carriers with all of the requisite checklist items in a nondiscriminatory fashion; and that SWBT's entry into the Missouri long-distance market is in the public interest. In addition, the Commission finds that the M2A complies with the requirements of 47 U.S.C. § 271(c). The Commission recommends that the FCC grant SWBT's Application for authorization to provide in-region, interLATA services in the state of Missouri.

IT IS THEREFORE ORDERED:

1. That the Missouri Interconnection Agreement (M2A) filed by SWBT on February 16, 2001, as revised on February 28, 2001, is found to meet the requirements of 47 U.S.C. § 271(c).
2. That any interconnection agreement adopted by a carrier and filed with the Commission with substantially the same terms and conditions as the Missouri Interconnection Agreement (M2A) shall be deemed approved by the Commission when filed.
3. That Southwestern Bell Telephone Company is found to meet the requirements in Missouri of the 14-point competitive checklist of 47 U.S.C. § 271(c)(2)(B).
4. That Southwestern Bell Telephone Company's entry into the long distance market in Missouri is in the public interest.
5. That the Missouri Public Service Commission supports Southwestern Bell Telephone Company's application for authority to provide in-region interLATA telecommunications service within Missouri.
6. That Gabriel Communications, Inc.'s motion to submit a supplemental affidavit is granted.
7. That AT&T's request to examine the confidential and proprietary work papers of Ernst & Young is denied.
8. That all motions not previously ruled on are denied and all objections not previously ruled on are overruled.
9. That this order shall become effective on March 25, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC.,
concur and certify compliance with the provisions of Section
536.080, RSMo 2000.

In the Matter of the Access Tariff Filing of Green Hills Telephone Corporation.*

*Case No. TT-2001-115
Decided March 20, 2001*

Telecommunications §18. The Commission approved a stipulation and agreement that required Green Hills Telephone Company to eliminate, effective January 1, 2001, the special annual amortization of \$156,000 implemented in Case No. TM-95-323.

ORDER APPROVING STIPULATION AND AGREEMENT

On August 23, 2000, Green Hills Telephone Corporation (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO-99-507 and TO-99-254. The tariff bears an effective date of October 1, 2000. On August 31, 2000, the Commission rejected the tariff filing because it did not comply with the requirement in Case Nos. TO-99-507 and TO-99-254 that the Company file a general rate case.

On September 11, 2000, the Company filed a Motion for Reconsideration, or in the Alternative, Application for Rehearing. The Company represented that, contrary to the Commission's interpretation, its August 23, 2000 filing was intended to meet all the requirements of a general rate case filing. The Company also represented that it followed the general rate case procedure set forth in the Commission's rules. Based upon the representations in the motion for reconsideration, the Commission reconsidered and vacated its August 31, 2000 order and considered the filing in compliance with the Reports and Orders in Case Nos. TO-99-507 and TO-99-254. Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T) were granted intervention.

On December 22, 2000, the Company withdrew its proposed tariff sheet, and on December 26, 2000, refiled it. The refiled tariff sheet was suspended until June 24, 2001.

On February 9, 2001, the Company, Staff, the Office of the Public Counsel, AT&T, and SWBT (the signatories) filed a unanimous stipulation and agreement (the stipulation). In the stipulation, the signatories recommend that the Company be authorized to file revised tariffs to: A) reduce e-911 trunk rates to a monthly flat rate of \$25; B) expand its Local Reach offering to the Richmond exchange served by SWBT; C) reduce the per minute terminating intrastate carrier common line (CCL) access rate from \$.077970 to \$.050679; and D) make permanent the interim originating intrastate CCL access rate of \$.014711. The signatories also recommend that the Commission direct the Company to: A) adopt the new depreciation rates that are attached to the stipulation; and B) eliminate, effective January 1, 2001,

*See page 246, Volume 9 MPSC 3d for another order in this case.

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the special annual amortization of \$156,000 implemented in Case No. TM-99-523. The signatories state that the Company has no refund obligation pursuant to the terms of the interim tariff.

On March 1, 2001, Staff filed suggestions in support of the stipulation. Staff points out that the positions taken in its rebuttal testimony support the stipulation, and requests that the Commission approve it. Also on March 1, 2001, Staff filed a substitute page 2 to its suggestions in support. No responses were filed to Staff's suggestions.

Pursuant to Section 536.060, RSMo 2000, the Commission may accept the stipulation and agreement as a resolution of the issues in this case. The

Commission has reviewed the stipulation and agreement and finds it to be reasonable and in the public interest and will, therefore, approve it.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on February 9, 2001, is approved.

2. That the following tariff sheet filed December 26, 2000, by Green Hills Telephone Corporation and assigned Tariff File No. 200100694, is rejected:

P.S.C. Mo. No. 2 Consolidated

4th Revised Sheet No. 78.2.1.1 canceling 3rd Revised Sheet No. 78.2.1.1

3. That Green Hills Telephone Corporation is authorized to file revised tariff sheets to implement the tariff changes listed in paragraphs 6.a.i) through 6.a.iv) of the Unanimous Stipulation and Agreement filed on February 9, 2001.

4. That Green Hills Telephone Corporation shall accrue depreciation expense beginning January 1, 2001, based on the depreciation rates attached to the stipulation and agreement filed on February 9, 2001.

5. That Green Hills Telephone Corporation shall eliminate, effective January 1, 2001, the special annual amortization of \$156,000 implemented in Case No. TM-95-323.

6. That all of the prefiled testimony is received into the record.

7. That this order shall become effective on March 30, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer,
and Simmons, CC., concur

Mills, Deputy Chief Regulatory Law Judge

Editor's Note: The Unanimous Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Application of Associated Natural Gas Company, a Division of Arkansas Western Gas Company, for Three-Year Variance from Section (19) of 4 CSR 240-10.030, Regarding the Testing of Gas Meters.

*Case No. GO-98-567
Decided March 20, 2001*

Gas §§2, 13, 15, 31, 37, 46. The Commission granted a variance of Commission rule 4 CSR 240 10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company, now known as Atmos Energy Corporation, to continue its meter sampling program for testing and replacement of meter equipment until December 31, 2001.

ORDER GRANTING EXTENSION OF VARIANCE

On July 21, 1998, the Missouri Public Service Commission (Commission) granted a variance for rule 4 CSR 240-10.030(19) upon the request of Associated Natural Gas (ANG), a division of Arkansas Western Gas Company. The variance waived the requirement of testing every meter at least every 120 months and permitting ANG to test its meters under a meter sampling program. The variance was granted for a period of three calendar years, ending on December 31, 2000, and the Commission had ordered ANG and Staff of the Commission (Staff) to file a report with their recommendations for the continuation or revision of the variance no later than November 30, 2000. No report was filed by November 30, 2000.

On February 13, 2001, the Commission issued an order directing ANG and Staff to file a report no later than February 28, 2001. On February 16, 2001, ANG filed notice in this case of the sale of its assets to Atmos Energy Corporation (Atmos). On February 28, 2001, Staff and Atmos, the successor to ANG, filed their joint report and recommendation.

In the joint report and recommendation, Atmos and Staff stated that ANG sold all of its Missouri gas properties to Atmos and the Commission approved the sale in Case No. GM-2000-312 on April 20, 2000, effective May 1, 2000. Atmos and Staff stated that they had reviewed the results for the calendar year 2000 sample testing program, which were attached as Appendix A to ANG's annual report, and incorporated into the joint report by reference. Atmos and Staff jointly recommended that the variance granted be extended through calendar year 2001. Further, Atmos and Staff recommended that Atmos be directed to file reference to the extension of the variance granted at an appropriate location in its tariff, and that such references or revised tariff sheets be filed no later than 30 days after the effective date of the order approving the extension of the variance. Atmos and Staff recommended that they be directed to file a report, jointly or separately, with their recommendations for continuation or revision of the variance no later than November 30, 2001. Atmos also agreed to file an annual report with the Commission in this case including the information specified in the application no later than January

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31, 2002. Further, Atmos agreed to provide Staff any available preliminary data for the meter testing program by November 1, 2001.

Since Atmos recently purchased ANG's properties and obtained authorization to provide gas in ANG's gas service area, the Commission finds it reasonable to extend this variance until December 31, 2001. The Commission also finds it reasonable to provide Atmos an additional year to evaluate its meter testing program. Therefore, the Commission will approve the extension of this variance through December 31, 2001. The Commission will also direct Atmos and Staff to file a report, jointly or separately, recommending continuation, revision or discontinuance of this program. These reports should explain the results of Atmos' evaluation of its meter testing program, make a recommendation regarding continuation or revision of the variance and state the reasons in support or opposition to the continuance or revision of the variance. The Commission shall direct the parties to file this report, or reports, no later than November 30, 2001.

IT IS THEREFORE ORDERED:

1. That the variance of rule 4 CSR 240-10.030(19) is extended from January 1, 2001, through December 31, 2001, as recommended by the Staff of the Missouri Public Service Commission and Atmos Energy Corporation on February 28, 2001.
2. That Atmos Energy Corporation shall file a reference to the extension of the variance granted at an appropriate location in its tariff, and that such references or revised tariff sheets shall be filed no later than April 19, 2001.
3. That the Staff of the Missouri Public Service Commission and Atmos Energy Corporation shall file a report, jointly or separately, with their recommendations for continuation or revision of the variance, stating reasons in support or opposition to the continuation or revision of the variance and explaining the results of the meter testing program no later than November 30, 2001.
4. That Atmos Energy Corporation shall file an annual report with the Missouri Public Service Commission in this case including the information specified in the application no later than January 31, 2002.
5. That Atmos Energy Corporation shall provide Staff of the Missouri Public Service Commission any available preliminary data for the meter testing program by November 1, 2001.
6. That this order shall become effective on March 30, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC., concur

Register, Regulatory Law Judge

In the Matter of Osage Water Company's Request for a Rate Increase for Sewer Service Pursuant to the Public Service Commission's Small Company Rate Increase Procedure.

Case No. SR-2000-556
Decided March 22, 2001

Sewer §14. Since all parties agree that there are no contested issues and that Osage should receive the revenue increase, and since no party objects to the tariffs that implement the increase, the Commission approved the tariff.

REPORT AND ORDER

Osage Water Company, on October 12, 1999, filed a request for a rate increase pursuant to 4 CSR 240-2.200. On November 14, 2000, Osage filed an Agreement Regarding Disposition of Small Company Rate Increase Request it had reached with the Staff of the Commission regarding the rate increase, together with a revised tariff sheet designed to implement that increase. The tariff sheet bears an effective date of December 29, 2000, and has been suspended until October 28, 2001. On November 30, 2000, the Office of the Public Counsel filed a request for a local public hearing pursuant to 4 CSR 240-2.200(1)(E). A local public hearing was held in Osage Beach on January 9, 2001. Public Counsel requested an evidentiary hearing on January 16, 2001, and the Commission held the hearing on March 5, 2001.

The agreement provides that Osage should be allowed to increase its annual revenue from the provision of sewer service by approximately \$3,690, explains how Osage will keep its books, and notes areas of disagreement about the proper accounting treatment for certain items. It also provides that Osage will not render bills in its own name for services it provides under contract management agreements.

Pursuant to a Commission order, Staff filed the written testimony of the following witnesses: Bible, Hubbs, Hummel, Johansen, McMellen, Meyer, Russo, and Schad. Public Counsel filed the written testimony of witness Bolin. The testimony all supports the increase.

In a pleading filed on February 26, 2001, the parties requested that the Commission cancel the hearing and Staff and Osage recommended that the Commission approve the tariffs. The Commission did not cancel the hearing, but convened it to allow questions from Commissioners. All of the testimony, along with the Staff Accounting Schedules, was admitted into evidence at the hearing.

Although Public Counsel did not join in the recommendation to approve the tariff, neither did it object to approval. Public Counsel agrees that there are no contested issues remaining for Commission decision.

Since all parties agree that there are no contested issues and that Osage should receive the revenue increase, and since no party objects to the tariffs that implement the increase, the Commission will approve the tariffs.

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IT IS THEREFORE ORDERED:

1. That the following tariff filed by Osage Water Company on November 14, 2000, and assigned tariff number 200000346, is approved for service on and after April 1, 2001:

P.S.C. MO No. 1

First Revised Sheet No. 10 canceling Original Sheet No. 10

2. That all motions not previously ruled upon by the Commission in this case are hereby denied and all objections not previously ruled upon are hereby overruled.
3. That this order shall become effective on April 1, 2001.
4. That this may be closed on April 2, 2001.

Lumpe, Ch., Drainer and Simmons, CC., concur; Murray, C., dissents with attached dissenting opinion; and certify compliance with the provisions of Section 536.080, RSMo 2000. Schemenauer, CC. absent

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

Because of my continuing concerns about the safety and adequacy of sewer service provided by Osage Water Company, I would not grant the rate increase. Based upon the evidence and upon the historical performance of the company, I have no reason to believe that the increase will result in improved service. I take this position, even though the Commission Staff agreed to the increase and the Office of the Public Council did not oppose it.

Staff witness Hummel testified that the sewer service is inadequate and that the rate increase is unlikely to solve or prevent any of the historical problems of the company. He also admitted that the company's record keeping is inadequate and that his expectations for improvement, based upon past performance, are not high.

OPC witness Bolin stated that OPC still has concerns about the safety and adequacy of sewer service provided by the company. Because of the small size of the increase, however, OPC did not believe anything would be gained by pursuing a challenge.

I cannot support even a small increase in rates for customers that are not receiving safe and adequate service, particularly when there is no reason to believe that service will improve. Therefore, I dissent.

**In the Matter of Laclede Gas Company's Experimental Price
Stabilization Fund.***

*Case No. GO-2000-394
Decided March 22, 2001*

Gas §1. The company filed proposed tariff sheets that purported to implement the Commission's modifications to the Experimental Price Stabilization Program. The Commission rejected the proposed tariff sheets, finding that they were not compliant with the Commission's order as they went beyond the Commission's directions.

ORDER REJECTING TARIFF

On February 13, 2001, the Commission issued its Order modifying Laclede Gas Company's (Laclede) Experimental Price Stabilization Program (PSP). The Order shortened the period during which Laclede could opt out of the price protection program and directed Laclede to augment the fund with \$4,000,000 of its own funds. The Commission directed Laclede to file, no later than February 23, 2001, a tariff revision in compliance with the Commission's Order.

Laclede filed its proposed tariff sheets on February 23, 2001. On March 15, 2001, the Staff of the Missouri Public Service Commission (Staff) filed a Motion to Suspend, along with an attached Memorandum, recommending that the Commission suspend Laclede's tariff sheets. Staff notes that it has reviewed the proposed tariff and concludes that the tariff sheets are not in compliance with the Commission's February 13, 2001, Order. Staff states that the Commission's Order requires Laclede to contribute \$4,000,000 of its own funds to increase the funds available to purchase price protection for the winter of 2001/2002. Staff alleges that Laclede has replaced the Commission's language, "its [Laclede's] own funds", with language that would insulate Laclede from any Commission review of the PSP at any time to the extent of the \$4,000,000. Staff contends that Laclede's language modification is significant, circumvents the Commission's procedural processes, and is detrimental to Laclede's customers. Staff recommends that the Commission suspend the proposed tariff and require the parties to establish a procedural schedule.

On March 19, 2001, Laclede filed a Motion for Opportunity to Respond Fully to Staff's Motion to Suspend. Laclede requested that the Commission grant it until noon on March 21, 2001, to fully respond to Staff's Motion to Suspend. The Commission issued an order on March, 20, 2001, granting this request.

Laclede filed its response to Staff's Motion to Suspend on March 21, 2001. Laclede argues that its proposed tariff does implement the terms of the Company's offer for contributing \$4 million to the funding of its Experimental PSP as directed by the Commission's February 13, 2001, Order. Laclede further contends that adoption of Staff's Motion to Suspend would eviscerate any effort to obtain meaningful price protection for Laclede's customers in advance of the next heating season, and is counter-productive to the interests of Laclede's customers.

*Please see pages 79 and 239 for other orders in this case.

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The Commission has reviewed the tariff sheets, Staff's Motion to Suspend, Laclede's responses, and the official file. The Commission determines that the last sentence of paragraph G of the proposed Tariff Sheet No. 28-e goes beyond the Commission's directives in its February 13, 2001, Order. Specifically, the Commission is unwilling to approve a tariff provision that purports to preclude the Commission from ever reviewing this matter in a future Actual Cost Adjustment proceeding. The Commission finds that the tariff as filed goes beyond the Commission's February 13, 2001, order, and should be rejected. However, should Laclede refile its proposed tariff without the additional language in the last sentence of paragraph G, Sheet No. 28-e, the Commission would be inclined to approve the tariff on an expedited basis to become effective in less than 30 days.

IT IS THEREFORE ORDERED:

1. That the Staff's Motion to Suspend Laclede's tariff sheets filed on February 23, 2001, is denied.
2. That the tariff sheets filed by Laclede Gas Company on February 23, 2001, Tariff File No. 200100869, are rejected. The sheets rejected are:
P.S.C. MO. No. 5
 4th Revised Sheet No. 28-e Cancelling 3rd Revised Sheet No. 28-e
 Original Sheet No. 28-e.1
3. That this order shall become effective on March 26, 2001.

Lumpe, Ch., Drainer, Murray, and Simmons, CC., concur.
 Schemenauer, C., absent.

Ruth, Regulatory Law Judge

In the Matter of the Application of Union Electric Company for an Order Authorizing: (1) Certain Merger Transactions Involving Union Electric Company; (2) the Transfer of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company; and (3) in Connection Therewith, Certain Other Related Transactions.*

Case No. EM-96-149
Decided March 27, 2001

Electric §§1, 20, 21. Rates §§37, 65, 79, 104. The Commission approved a credit sharing in the amount of \$28,000,000, to be distributed to AmerenUE customers as a result of the

*See page 380 for another order in this case. In addition, see Volume 5 MPSC 3d page 157, Volume 6 MPSC 3d page 28, and Volume 9 MPSC 3d pages 25, 396 and 399 for other orders in this case.

second sharing period of its Experimental Alternative Regulation Plan, upon finding that the proposed sharing credit amount is reasonable.

**ORDER APPROVING SECOND YEAR SHARING CREDIT OF THE
SECOND EXPERIMENTAL ALTERNATIVE REGULATION PLAN
AND ORDER APPROVING STIPULATION AND AGREEMENT**

On October 12, 2000, Union Electric Company d/b/a AmerenUE (AmerenUE) filed its Final Earnings Report for the second year sharing period of the second Experimental Alternative Regulation Plan (EARP). On December 1, 2000, the Office of the Public Counsel (Public Counsel) and the Staff of the Missouri Public Service Commission (Staff) filed their separate pleadings notifying the Commission of the areas of disagreement each had with AmerenUE's Final Earnings Report. On March 14, 2001, Staff, Public Counsel, and AmerenUE filed a Stipulation and Agreement (Agreement) that proposed to resolve all of the issues raised and which, if approved, would result in a total dollar amount sharing credit of \$28,000,000 to be distributed to ratepayers. AmerenUE, Staff and Public Counsel requested that the Commission approve the Agreement and direct AmerenUE to effectuate a one time credit to its Missouri electric retail customers in the total dollar amount of \$28,000,000.

A nonunanimous stipulation and agreement is an agreement filed by fewer than all parties.¹ Not all of the parties signed this Agreement. Missouri Energy Group, Missouri Industrial Energy Consumers, the State of Missouri ex rel. Attorney General Jay Nixon, Retirement Facilities Coalition, and The Doe Run Company were not signatories. The Commission may treat a nonunanimous stipulation and agreement as a unanimous stipulation and agreement if no party requests a hearing within seven days from the filing of the nonunanimous stipulation and agreement.² No party requested a hearing in this case. Therefore, the Commission will treat this Agreement as unanimous. A copy of the Agreement is affixed to this order and marked as Attachment A.

The Commission has reviewed the Agreement submitted by the signatory parties, as well as Staff's Suggestions in Support of the Stipulation and Agreement filed on March 19, 2001. The Commission finds the proposed sharing credit to be reasonable. The Commission will approve the sharing credit in the total dollar amount of \$28,000,000, as set out in the Stipulation and Agreement, and will order AmerenUE to implement the one time credit by adding the appropriate amount to its Missouri retail electric customers' bills, totaling \$28,000,000.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed by the Union Electric Company d/b/a AmerenUE, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, on March 14, 2001, is approved.

¹4 CSR 240-2.115 Nonunanimous Stipulations and Agreements.

² *Id.*

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2. That Union Electric Company d/b/a AmerenUE shall issue credits to its retail electric customers in the total dollar amount of \$28,000,000 for the second year sharing period of the second Experimental Alternative Regulation Plan approved by the Commission in Case No. EM-96-149.

3. That Union Electric Company d/b/a AmerenUE shall notify the Commission upon the completion of the issuance of the second year sharing credits to retail electric customers as directed in Ordered Paragraph No. 2 of this order.

4. That this order shall become effective on April 6, 2001.

Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC.,
concur.

Register, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

In the Matter of Osage Water Company's Request for a Rate Increase for Water Service Pursuant to the Public Service Commission's Small Company Rate Increase Procedure.*

Case No. WR-2000-557
Decided March 29, 2001

Water §8. Osage is a public utility engaged in the provision of water service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 2000.

Water §16. The Commission authorized Osage Water Company to file tariffs that implement an increase in annual water revenues of \$54,303.

REPORT AND ORDER

Findings of Fact

Osage Water Company, on October 12, 1999, filed a request for a rate increase pursuant to 4 CSR 240-2.200. Osage is a public utility engaged in the provision

*See pages 555 and 557 for other orders in this case.

of water service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 2000.

On November 14, 2000, Osage filed an Agreement Regarding Disposition of Small Company Rate Increase Request it had reached with the Staff of the Commission regarding the rate increase, together with a revised tariff sheet designed to implement that increase. The tariff sheet bears an effective date of December 29, 2000, and has been suspended until October 28, 2001. The agreement provides that Osage should be allowed to increase its annual revenue from the provision of water service by approximately \$60,000, explains how Osage will keep its books, and notes areas of disagreement about the proper accounting treatment for certain items. It also provides that Osage will not render bills in its own name for services it provides under contract management agreements, that it will seek certificates for areas currently uncertificated or dispose of the systems and stop providing service, and that it will install certain meters. The agreement also noted that it was a compromise reached after extensive negotiations:

Other than the specific conditions agreed upon by the Staff and the Company, and expressly set out herein, the terms of this Disposition Agreement reflect compromises that have resulted from extensive negotiations between the Staff and the Company, and neither party has agreed to any particular ratemaking principle in arriving at the amount of the annual operating revenue increase specified herein.

On November 30, 2000, the Office of the Public Counsel filed a request for a local public hearing pursuant to 4 CSR 240-2.200(1)(E). A local public hearing was held in Osage Beach on January 9, 2001. Approximately ten Osage customers testified about service quality problems, and approximately five of those customers receive water service from Osage in areas covered by the revised tariff sheet filed on November 14, 2000.

Public Counsel, on January 16, 2001, filed a pleading in which it asked the Commission to suspend the proposed tariff sheets, and schedule an evidentiary hearing "to address issues of the quality of customer service, as well as any ratemaking treatment which [sic] should flow from customer service issues."

In response to this motion, on January 31, 2001, the Commission granted Public Counsel's motion to hold an evidentiary hearing, and ordered the prefilings of written testimony.

Pursuant to this Commission order, on February 14, 2001, Staff filed the written direct testimony of the following witnesses: Bible, Hubbs, Hummel, Johansen, McMellen, Meyer, Russo, and Schad. Staff conducted a thorough audit of all Osage's books and records, and performed a full analysis of Osage's rate base, revenues, and expenses. Staff also analyzed Osage's cost of capital. The testimony supports a revenue increase of approximately \$54,000 rather than the approximately \$59,000 set out in the Disposition Agreement. The difference in the two figures is the result of a mistake Staff made concerning Osage's capital

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structure when it entered into the Disposition Agreement. Staff's testimony also addresses customer service issues and rate design.

On the same day, Public Counsel filed the written testimony of witness Bolin. Public Counsel's testimony expresses concern with the quality of service Osage provides to its customers, and although the testimony expresses concern over the affiliate transactions between Osage and other businesses of two of its officers, those concerns were not well developed, and Public Counsel conceded that they were fairly addressed in Staff's proposed increase. Public Counsel advocated the position that any increase granted to Osage should be phased in, so that Osage would receive half of the increase upon Commission approval, and the other half when it had met the conditions in the disposition agreement.

On February 26, 2001, the parties filed their proposed list of issues. Staff and Public Counsel submitted that the only remaining issue was whether Osage should be required to phase in the then-agreed-upon increase:

Should the rate increase that the Staff and the Company agreed upon for water service be "phased in," so that the Company would be entitled to receive one half of the increase upon Commission approval of the subject tariff sheets, but could not begin to bill for the other one half of the increase until after it has complied with the conditions contained in its agreement with the Staff?

Osage denied that this was a proper issue, and on the same day submitted a letter in which it stated that it would not be filing rebuttal testimony since there were no contested issues.

On February 28, 2001, the Staff and Public Counsel filed their statements of position on this issue. Staff opposed the phase-in, and Public Counsel supported it. Both Staff and Public Counsel suggested as an alternative that "the Commission should grant an interim rate increase, and condition any permanent rate increase on Osage Water Company's verified compliance with the conditions contained in its agreement with Staff."

At the evidentiary hearing, Osage presented testimony of Pat Mitchell, the company president. Mr. Mitchell testified that Osage will have no problem meeting the timelines for the conditions set out in the disposition agreement, with one exception. Mr. Mitchell stated, and the Commission finds, that Osage may not be able to install meters to individual condominium units at the Harbor Bay condominium development because of ongoing litigation concerning that development. Given this uncertainty, the Commission will not require Osage to comply with the metering condition with respect to this development.

Later in the evidentiary hearing (and in its brief), Public Counsel had all but abandoned its position that any rate increase should be phased in and instead advocated making the rate increase interim.

Because the prefiled written testimony of the Staff and Public Counsel witnesses is unrefuted (except for the issue of metering the condominium units at Harbor Bay), the Commission accepts it in its entirety, and makes the following

findings: A) the cost of capital for Osage is 10.6 percent; B) the rate base used for the provision of water service on which Osage is entitled to earn a return is \$243,976; C) Osage requires an increase of \$54,304; D) the rate design to implement this increase should be based on the testimony of Staff witness Hubbs; and E) Osage should be required to comply with the conditions in the Disposition Agreement with the one exception.

Conclusions of Law

All of Staff's prefiled testimony supports an increase of between \$53,725 and \$54,822. Osage did not prefile any written testimony, and none of the testimony of its witness at the evidentiary hearing contradicted Staff's calculation of Osage's appropriate revenue requirement. Public Counsel's witness, in her prefiled testimony, supported the higher amount in the Disposition Agreement, but modified her position in her testimony at the evidentiary hearing to support the revised increase figures in Staff's prefiled testimony.

Staff's analysis considered all relevant factors. The Commission accepts this analysis and concludes that allowing Osage an increase in revenue of \$54,304 will allow Osage the opportunity to earn a reasonable return on its rate base, and will result in just and reasonable rates. There is almost no evidence from which the Commission could reach a different conclusion.

The Commission's analysis, however, does not end there. Much of the testimony (at the local public hearing, prefiled, and at the evidentiary hearing) addressed the quality of service Osage provides to its customers. While meeting the conditions set forth in the Disposition Agreement may not directly improve the quality of service, it may have indirect benefits. For example, deeding the Moss Hollow and Cavern View systems back to the homeowners would allow Osage to concentrate on providing better service to its customers in certificated areas. Metering the output of its wells will also be helpful from the perspective of customer service. To ensure that Osage has incentives to quickly meet these conditions, and ensure that its customers receive safe and adequate service, the Commission will make the rate increase interim.

The Courts have long recognized that the Commission has the authority to grant an interim rate increase:

We hold that the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation. 535 S.W.2d 561, State ex rel. Laclede Gas Co. v. Public Service Commission, (Mo.App. 1976), at 567.

At the hearing, Osage witness Mitchell testified that he had reservations about having any rate increase made interim because he believed that Osage would not be able to file a general rate case during the period that the interim rates were in effect. None of the parties addressed this issue in their briefs, and the Commission finds Mr. Mitchell's concerns to be incorrect. In fact, the opposite is generally held to be the case, and interim rates are usually in effect only until permanent rates are

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established. But under the particular circumstances of this case, the Commission concludes that the public interest requires that Osage's rate increase be made interim until the measures in the Disposition Agreement that are designed to protect Osage's customers have been accomplished. Osage anticipates complying with all of the conditions (except meter installations at Harbor Bay) within the times set out in the disposition agreement. Accordingly, the interim nature of the rate increase should be lifted soon. Even if it is not, nothing precludes Osage from filing a general rate case at any time.

The Commission remains concerned about the quality of service Osage provides, and complying with the conditions in the Disposition Agreement may not, in itself, be enough to improve that service. To ensure that Osage continues to improve the service it provides, the Commission will direct Staff to continue monitoring Osage, and to file a report.

Pending Motions

At the hearing, Osage was surprised to learn that Staff no longer supported the revenue increase figure in the Disposition Agreement.¹ Osage stated that the "Commission should proceed with the evidence as presented, determine a fair and appropriate rate to be charged by the Company for its water utility service." That is precisely what this Report and Order does. Osage also requested that the Commission establish a new case to afford Osage the opportunity to bring the issues that were unresolved in the Disposition Agreement before the Commission. Osage may, of course, file a rate case in which these issues are addressed, and the Commission will establish a case if Osage files for a rate increase, but the Commission will not establish a new case as a continuation of this one. This case is a proceeding under the Commission's small company rate increase procedure rules, and it has been taken as far as it can go. The Commission will deny Osage's motion to open a new case.

On March 20, 2001, Public Counsel filed a motion to accept late-filed exhibit. Public Counsel's motion does not comply with 4 CSR 240-2.080(3), 4 CSR 240-2.110(8), and 4 CSR 240-2.130(17) and will be denied.

IT IS THEREFORE ORDERED:

1. That the following tariff sheet filed by Osage Water Company on November 14, 2000, and assigned tariff number 200000345, is rejected:

P.S.C. MO No. 1

2nd Revised Sheet No. 5 canceling 1st Revised Sheet No. 5

2. That Osage Water Company is authorized to file tariffs that implement an increase in annual water revenues of \$54,303, using a rate design based on Staff Witness Hubbs' Direct Testimony.

¹Nowhere in its prefiled testimony did Staff state explicitly that it no longer supported the agreement. In the list of issues and its Statement of Position, Staff identified the only issue remaining as whether Osage should get the agreed-upon increase at once, in phases, or as an interim increase. It did not identify that it supported a smaller increase. At the hearing, Staff witness Meyer initially testified that he was still in support of the Disposition Agreement as executed by the parties. He was later recalled to the witness stand to recant that testimony.

3. That the tariffs discussed in Paragraph 2 are interim subject to Osage Water Company's verified compliance with the conditions contained in the Disposition Agreement, with the exception that meters need not be installed at individual condominium units at the Harbor Bay condominium development.

4. That Osage Water Company, once it has complied with the conditions discussed in Paragraph 3, shall file a verified pleading stating that it has so complied.

5. That the Staff of the Commission shall, no later than ten days after the filing of the pleading discussed in paragraph 4, file a responsive pleading stating its position on whether Osage Water Company has complied with the conditions.

6. That, if Osage Water Company has not filed the pleading discussed in paragraph 4 by September 28, 2001, the Staff of the Commission shall file a report on the progress of Osage Water Company toward completing the conditions.

7. That the Staff shall monitor the quality of service Osage Water Company provides to its customers, and shall file a report, in a new case, on September 28, 2001, that details the results of this monitoring.

8. That the Motion to Accept Late-filed Exhibit filed by the Office of the Public Counsel on March 21, 2001, is denied.

9. That the motion made by Osage Water Company at the evidentiary hearing to establish another case is denied.

10. That all motions not previously ruled upon by the Commission in this case are hereby denied and all objections not previously ruled upon are hereby overruled.

11. That this order shall become effective on April 8, 2001.

Lumpe, Ch., Drainer, Schemenauer, and Simmons, concur;
Murray, C., dissents, with dissenting opinion attached;
certify compliance with the provisions of Section 536.080,
RSMo 2000.

Deputy Chief Regulatory Law Judge: Lewis Mills

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I dissent from the majority's decision to grant this rate increase for several reasons.

First, Osage Water Company has not fulfilled its obligation to provide safe and adequate service. I find no credible evidence to suggest that a rate increase will change the company's performance. The Office of the Public Counsel requested a local public hearing after receiving forty-five written complaints from customers about poor service. Customers who attended that hearing were clearly unhappy with their service. Staff testified at the evidentiary hearing that it continues to consider this company a problem utility and that a rate increase is unlikely to result in elimination of any or all of the company's historic customer service deficiencies.

Second, this case was submitted under the Commission's Small Company Rate Increase Procedure, 4CSR 240-2.200, and should be dismissed for lack of

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agreement between Staff and the company. On November 14, OWC filed a non-unanimous agreement for disposition of the rate increase request. Only Staff and the company signed this disposition agreement, which included reference to several areas of continuing disagreement. Subsequently, Staff pre-filed direct testimony that revealed a calculation error and Staff therein changed its recommended revenue requirement increase to a mid-range of \$54,304 rather than the \$59,832 contained in the disposition agreement. The Company pre-filed a letter in lieu of rebuttal testimony, in which it stated,

“ . . . after review of the pre-filed testimony . . . Osage Water Company has been unable to identify any material issue in dispute raised by said pre-filed testimony which would require . . . the filing of rebuttal testimony by OWC.”

Nevertheless, OWC claimed “surprise” near the end of the evidentiary hearing and alleged that no agreement currently existed between the company and Staff. Company counsel asked for “a contested hearing posthaste.” Counsel for both Staff and OWC answered, in response to a question from the bench, that if there is no agreement between Staff and the company in the small company rate increase procedure, the only alternative available is for the company to file a general rate case. This case should be dismissed for lack of agreement between Staff and the company.

Third, the history of this company is that of non-compliance with Commission rules and statutory requirements. I find no reason to believe that an increase in rates will adjust this pattern of disregard for regulatory authority. Even now, the company is not current with its annual reporting requirements. In fact, Staff stated at the evidentiary hearing that the company would be denied rate relief, based on noncompliance with that commission requirement, if the request were filed today. Furthermore, Staff was never provided with the financial information it requested in order to perform its investigation in conjunction with this rate increase request. Staff testified that it had to reconstruct that information in order to have any basis for determining a revenue requirement. Certainly OWC has not demonstrated a willingness to cooperate with Staff or to comply with regulatory requirements. If the company is not willing to cooperate or comply with regulatory requirements even while seeking a rate increase, there is little reason to believe that cooperation or compliance would ever be forthcoming.

Finally, ratepayers should not be expected to pay even more for the poor service they receive. In its post-hearing brief, the Office of the Public Counsel cited case precedent for denying rate increases to cover the cost of service for companies that do not provide safe and adequate service. As the Commission stated in the case of *North Missouri Telephone Co.*, 49 PUR 3d, 313 (MO.PSC Case No. 15,054) (1963),

“the commission should never lose sight of the cardinal principle of regulation, that the public should and must receive adequate service. Until (the company’s customers) receive

the adequate service to which they are entitled, this commission would be derelict in its duty in imposing" higher rates. 49 PUR 3d, at 318.

I respectfully dissent.

In the Matter of the Tariff Filing of Oregon Farmers Mutual Telephone Company.

*Case No. TT-2001-328
Decided April 3, 2001*

Telecommunications §14. The Commission approved a non-unanimous stipulation and agreement that authorized Oregon Farmers Mutual Telephone Company to file tariff sheets to establish per minute access rates for originating carrier common line service of \$0.039078 and for terminating carrier common line service of \$0.069161.

Rates §110. The Commission approved a non-unanimous stipulation and agreement that authorized Oregon Farmers Mutual Telephone Company to file tariff sheets to establish per minute access rates for originating carrier common line service of \$0.039078 and for terminating carrier common line service of \$0.069161.

ORDER APPROVING STIPULATION AND AGREEMENT

On November 27, 2000, Oregon Farmers Mutual Telephone Company (the Company) submitted to the Commission a tariff sheet designed to make permanent the interim revenue surcharge that it implemented pursuant to Reports and Orders issued in Case Nos. TO 99 507 and TO 99 254. The tariff bears an effective date of December 31, 2000, and has been suspended until May 30, 2001. On January 12, 2001, Southwestern Bell Telephone Company was granted intervention.

On March 30, 2001, the parties filed a unanimous stipulation and agreement, in which they recommend, instead of the Commission approving the revised tariff sheet, that the Company be authorized to file revised tariff sheets to establish per minute access rates for originating carrier common line service of \$0.039078 and for terminating carrier common line service of \$0.069161. The stipulation also provides that the Commission direct the Company to adopt the new depreciation rates that are attached to the stipulation, effective on the first day of the month following the effective date of this order. The stipulation also provides the Company shall complete work on the purchase and installation of circuit equipment and place it in service no later than June 30, 2001, and that the Company shall provide certain information to the Staff. The parties state that the Company has no refund obligation pursuant to the terms of the interim tariff, and stipulate to the admission of all the prefiled testimony.

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Pursuant to Section 536.060, RSMo 2000, the Commission may accept the stipulation and agreement as a resolution of the issues in this case. The Commission has reviewed the stipulation and agreement and finds it to be reasonable and in the public interest and will, therefore, approve it.

On March 19, 2001, the Company filed a motion to extend the date for filing its surrebuttal testimony. Approving the stipulation makes that motion moot, and also renders the scheduled evidentiary hearing unnecessary.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on March 30, 2001, is approved.
2. That the following tariff sheet filed August 23, 2000, by Oregon Farmers Mutual Telephone Company, and assigned Tariff File No. 200100585, is rejected:

P.S.C. MO No. 6

8th Revised Sheet No. 147 canceling 7th Revised Sheet No. 147

3. That Oregon Farmers Mutual Telephone Company is authorized to file revised tariff sheets to establish per minute access rates for originating carrier common line service of \$0.039078 and for terminating carrier common line service of \$0.069161.

4. That Oregon Farmers Mutual Telephone Company shall accrue depreciation expense beginning May 1, 2001, based on the depreciation rates attached to the stipulation and agreement.

5. That Oregon Farmers Mutual Telephone Company shall complete work on the purchase and installation of circuit equipment and place it in service no later than June 30, 2001.

6. That Oregon Farmers Mutual Telephone Company shall provide to the Staff of the Commission the information described in the stipulation and agreement.

7. That the testimony of Robert C. Schoonmaker, Steve M. Traxler, William A. Meyer, Jr., Mark L. Oligschlaeger, Rosella L. Schad, David Murray, and Phillip M. Garcia is received into the record.

8. That this order shall become effective on April 13, 2001.

Lumpe, Ch., Drainer, Murray, and Simmons, CC., concur
Gaw, C., not participating

Mills, Deputy Chief Regulatory Law Judge

Editor's Note: The Unanimous Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of UtiliCorp United Inc.'s Tariff Filed to Update
the Rules and Regulations for Gas and to Increase the
Interest Rate Paid on Deposits, the Late Payment Charge,
the Reconnection Fee, and the Charge for Returned Checks.**

*Case No. GT-2001-484
Decided April 3, 2001*

Rates §69. A letter sent by the Commission to a utility indicating that the Commission did not intend to act to suspend a tariff before its effective date was not an approval of the tariff, and did not preclude the Commission from subsequently suspending the tariff.

Rates §62. When the Commission determines the appropriateness of a proposed rate it must consider all relevant factors, rather than just a single factor.

Rates §62. A utility's tariff that would have changed various fixed customer charges outside the context of a general rate case was rejected as single-issue ratemaking.

ORDER REJECTING TARIFF

On February 16, 2001, UtiliCorp United Inc. filed a tariff to make changes to the interest paid on customer deposits, late payment charges, reconnection fees and charges from returned checks for customers of UtiliCorp's St. Joseph Light & Power (SJLP) division's natural gas operations. The changes proposed in the tariff are designed to conform the charges paid by customers of the SJLP division with those paid by customers of UtiliCorp's Missouri Public Service (MoPub) division. UtiliCorp's tariff bears an effective date of May 1, but the cover letter that accompanied the tariff requested that the Staff of the Commission send UtiliCorp the approved tariff sheets by March 19, to aid UtiliCorp in planning and implementing the changes by May 1.

On March 12, the Office of the Public Counsel filed a Motion to Dismiss or Suspend. Public Counsel argued that changes to rates included in UtiliCorp's tariff could only be made within a general rate case. Public Counsel contended that approval of such rate changes in this tariff would constitute improper single-issue ratemaking.

On March 19, UtiliCorp filed suggestions in opposition to Public Counsel's motion. UtiliCorp states that synchronizing the charges would allow it to avoid as much as \$100,000 of total costs that will be necessary to modify the programming and coding of its current Customer Information System to accommodate differing charges and fees for its SJLP and MoPub divisions. UtiliCorp asserts that under the circumstances, approval of its proposed rate changes would not be single-issue ratemaking. In addition, UtiliCorp argued that Public Counsel's motion was essentially moot because the Commission already approved UtiliCorp's tariff through a letter sent to UtiliCorp on March 14.

Staff, on March 19, filed its own response to Public Counsel's motion. In its response, Staff agreed with Public Counsel that the proposed tariff revisions would

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constitute single-issue ratemaking and that they might be detrimental to SJLP's ratepayers. As part of its response, Staff asked the Commission to consolidate this case with Case Nos. ET-2001-482 and HT-2001-485, cases established to consider similar tariffs filed by UtiliCorp for its electric and steam heating operations.

UtiliCorp's Suggestions in Opposition and Staff's response triggered additional pleadings from the parties. Public Counsel filed a reply on March 21 in which it agreed with Staff's request to consolidate, and disagreed with UtiliCorp's suggestions. UtiliCorp filed an additional reply on March 22, in which it agrees with Staff's request to consolidate, but reiterates its position that its proposed rate changes are not single issue ratemaking and that the Commission has already approved the tariffs. Staff filed a reply to UtiliCorp's Suggestions in Opposition on March 26.

There are two issues that must be addressed with regard to UtiliCorp's tariff. First, has the Commission already approved UtiliCorp's tariff? Second, would implementation of UtiliCorp's tariff constitute single-issue ratemaking?

Previous Approval of Tariff

UtiliCorp argues that the Commission has already approved its tariff because it has received a letter from the Commission, dated March 14, in which the Commission states that "the tariff filing submitted with your letter of transmittal . . . is being made effective in accordance with Section 393.140(11) RSMo 1994." UtiliCorp states that such letter is consistent with the Commission's customary practice regarding approval of tariff sheets. UtiliCorp misunderstands the meaning of the Commission's March 14 letter.

Section 393.140(11), RSMo 2000, permits a utility to file a tariff with the Commission establishing a new rate or charge with a thirty day effective date. Unless the Commission acts under Section 393.150, RSMo 2000, to suspend that rate or charge, it goes into effect on its effective date.¹ The letter that UtiliCorp received from the Commission simply notified UtiliCorp that, at the time the Commission sent the letter, it did not intend to take any action to prevent the tariff from going into effect by operation of law - specifically Section 393.140(11), RSMo 2000 - on its effective date.

The letter is not a decision or order of the Commission. And indeed, under the principles announced by the Missouri Supreme Court in the *Philipp Transit Lines* case,² it cannot be a decision or order of the Commission because it was not adopted by a majority of the Commissioners at a public agenda meeting. The tariff submitted by UtiliCorp, by its terms, does not become effective until May 1, 2001. Therefore, it is still subject to the Commission's review under Section 393.150, RSMo 2000, until its effective date. The letter received by UtiliCorp cannot preclude the Commission's further review of UtiliCorp's tariff.

¹*State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. banc 1979)

²*State ex rel. Philipp Transit Lines, Inc. v. Public Service Comm'n, et al.*, 552 S.W.2d 696 (Mo. banc 1977).

Single-Issue Ratemaking

The law is quite clear that when the Commission determines the appropriateness of a rate or charge that a utility seeks to impose on its customers, it is obligated to review and consider *all* relevant factors, rather than just a single factor.³ To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without recognizing counterbalancing savings in another area. Such a practice is justly considered to be single-issue ratemaking.⁴

UtiliCorp, through its proposed tariffs, seeks to change various fixed charges applied to customers of its SJLP division. Some charges would be increased, and some decreased. UtiliCorp has not submitted tariffs that would revise its rates generally. Instead, UtiliCorp requests that these changes to its rates be approved outside a general rate case. In other words, UtiliCorp asks the Commission to approve these charges without considering all relevant factors.

In order to avoid condemnation as single-issue ratemaking, UtiliCorp argues that its tariff should be approved as a matter of expediency. UtiliCorp points out that the net effect of its proposed changes would result in an increase in UtiliCorp's revenues of only about \$11,000 per year. UtiliCorp also alleges that synchronizing the charges and fees of its SJLP and MoPub divisions will allow it to avoid as much as \$100,000 of total costs required to modify the programming and coding of its current Customer Information System to accommodate differing charges and fees. UtiliCorp's practical arguments have a certain appeal. But the Commission simply does not have the authority to engage in single-issue ratemaking, and convenience, expediency, and necessity are not proper matters for consideration when determining the extent of the Commission's authority.⁵

The Commission takes seriously its obligation to consider all factors before approving any tariff that would increase the rates or charges paid by the customers of a utility. Thus, for example, the Commission recently rejected, as single-issue ratemaking, a tariff offered by a small telephone company that would have introduced a \$5.00 late-payment charge.⁶ UtiliCorp asks the Commission to approve changes to its customer charges without considering all factors. The Commission does not have the authority to do so. Therefore, UtiliCorp's tariffs cannot be approved.

Because it violates the prohibition against single-issue ratemaking, the Commission is without authority to approve UtiliCorp's tariff. Suspension of the tariff for further consideration would be pointless. For that reason the tariff submitted by

³ *State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704 (Mo. 1957); *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979); and *Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470 (Mo. App. W.D. 1998).

⁴ *Midwest Gas Users' Association* at 480.

⁵ *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979); *Kansas City v. Public Service Commission*, 301 Mo. 179, 257 S.W. 462 (banc 1923)

⁶ *In the Matter of the Chapter 33 Tariff Filing of Miller Telephone Company*, Report and Order, Case No. TT-2001-257, December 12, 2000.

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UtiliCorp will be rejected. With the rejection of the tariff, there is no reason to consolidate this case with the similar cases regarding UtiliCorp's electric and steam operations. Staff's Motion to Consolidate will be denied.

IT IS THEREFORE ORDERED:

1. That the Staff of the Public Service Commission's Motion to Consolidate is denied.
2. That the tariff sheets issued by UtiliCorp United Inc. on February 16, 2001 (tariff file number 200100848) with an effective date of May 1, 2001, are rejected. The tariff sheets rejected are:

P.S.C. Mo. No. 4

3rd Revised Sheet No. R-1, Canceling 2nd Revised Sheet No. R-1
 1st Revised Sheet No. R-15.1, Canceling Original Sheet No. R-15.1
 2nd Revised Sheet No. R-18, Canceling 1st Revised Sheet No. R-18
 2nd Revised Sheet No. R-19, Canceling 1st Revised Sheet No. R-19
 1st Revised Sheet No. R-22.2, Canceling Original Sheet No. R-22.2
 3rd Revised Sheet No. R-23, Canceling 2nd Revised Sheet No. R-23
 4th Revised Sheet No. R-29, Canceling 3rd Revised Sheet No. R-29

3. That this order shall become effective on April 13, 2001.

Lumpe, Ch., and Simmons, CC., concur
 Drainer, C., concurs with concurring opinion attached
 Murray, C., dissents with dissenting opinion attached
 Gaw, C., not participating

Woodruff, Senior Regulatory Law Judge

CONCURRING OPINION OF VICE CHAIR M. DIANNE DRAINER

I respectfully concur with the decision of the Commission. The tariff submitted by UtiliCorp clearly must be rejected as single-issue ratemaking. I write separately to address concerns raised by UtiliCorp regarding transition costs that it states it will incur if its tariff is not approved. If UtiliCorp does incur transition costs necessary to complete the merger with St. Joseph Light & Power Company, it will have the opportunity to present those costs to the Commission for consideration in an upcoming rate case. The Commission will give due consideration to those costs at the time they are presented.

Respectfully submitted.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

Today's Order Rejecting Tariff is similar to straining out gnats and swallowing camels. The tariff sheets in this and case numbers ET-2001-482 and HT-2001-485 were for the stated purpose of making certain changes to synchronize charges

and fees between Utilicorp's Missouri divisions in order to avoid substantial reprogramming expense.

While some charges would be reduced, the net effect of the tariffs would be to increase revenues to the electric, gas and steam operations of UtiliCorp's St. Joseph Light & Power Division by \$11,240. UtiliCorp states that the reprogramming expense to be avoided is approximately \$100,000. Today's decision, therefore, may result in increased costs of approximately nine hundred per cent, or more.

Single-issue ratemaking can occur when consideration of some costs in isolation improperly allows an increase in rates without consideration of offsetting savings. Such a result would not be revenue neutral. In its initial recommendation for approval of these tariffs, however, Staff stated that it "considers this change to be revenue neutral as this amount is so small as to be insignificant." I concur with Staff's original reasoning.

The Utility Operations Division circulated, along with Staff's recommendation, a routing slip to the Commissioners for approval of the tariff "by delegation." All five Commissioners initialed to approve "by delegation." This action had the effect of authorizing the tariff to become effective by operation of law, which means without a Commission vote. Accordingly, on March 6, the Commission Secretary sent written notice to the company that "the tariff filing submitted . . . is being made effective in accordance with Section 393.140(11) RSMO 1994." The majority now claims, in effect, that there was no decision of the Commission because nothing was adopted by a majority of the Commissioners at a public agenda meeting. The Commission did, however, delegate authority to advise the company that the tariff would become effective by operation of law. The company was thereby placed on notice that no formal Commission action was planned and that the tariff would become effective at the expiration of the required 30-day notice period.

The Missouri statutes give the Commission the power to "authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized . . . to do or perform; provided, that no order, rule or regulation of any person employed by the commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission." 386.240 RSMO While the majority cites *Philipp Transit Lines Inc. v. Public Service Comm'n, et al.* (552 S.W. 2d 696 (Mo. Banc 1977) for the proposition that the letter to the company had no meaning because no vote was taken in a public agenda meeting, I submit that the Commission properly delegated authority to Staff to circulate tariffs recommending approval "by delegation." No vote was required, because the tariff was to be allowed to go into effect by operation of law. Express authorization for the Secretary of the Commission to advise the company that the tariff would become effective by operation of law occurred when the routing slip was circulated and initialed.

While it is true that the Commission could suspend or possibly even reject the tariff prior to the operation of law date, notwithstanding notice to the utility that the tariff would become effective, such action should not be taken, as it is here, where no substantial reason exists. Parties should be able reasonably to rely upon official correspondence issued by delegation of Commission authority.

For these reasons, I respectfully dissent.

10 Mo. P.S.C. 3d

**In the Matter of UtiliCorp United Inc.'s Tariff Filed to Update
the Rules and Regulations for Electric and to Increase the
Interest Rate Paid on Deposits, the Late Payment Charge,
the Reconnection Fee, and the Charge for Returned Checks**

*Case No. ET-2001-482
Decided April 3, 2001*

Rates §69. A letter sent by the Commission to a utility indicating that the Commission did not intend to act to suspend a tariff before its effective date was not an approval of the tariff, and did not preclude the Commission from subsequently suspending the tariff.

Rates §62. When the Commission determines the appropriateness of a proposed rate it must consider all relevant factors, rather than just a single factor.

Rates §62. A utility's tariff that would have changed various fixed customer charges outside the context of a general rate case was rejected as single-issue ratemaking.

ORDER REJECTING TARIFF

On February 16, 2001, UtiliCorp United Inc. filed a tariff to make changes to the interest paid on customer deposits, late payment charges, reconnection fees and charges from returned checks for customers of UtiliCorp's St. Joseph Light & Power (SJLP) division's electric operations. The changes proposed in the tariff are designed to conform the charges paid by customers of the SJLP division with those paid by customers of UtiliCorp's Missouri Public Service (MoPub) division. UtiliCorp's tariff bears an effective date of May 1, but the cover letter that accompanied the tariff requested that the Staff of the Commission send UtiliCorp the approved tariff sheets by March 19, to aid UtiliCorp in planning and implementing the changes by May 1.

On March 9, the Office of the Public Counsel filed a Motion to Dismiss or Suspend. Public Counsel argued that changes to rates included in UtiliCorp's tariff could only be made within a general rate case. Public Counsel contended that approval of such rate changes in this tariff would constitute improper single-issue ratemaking.

On March 19, UtiliCorp filed suggestions in opposition to Public Counsel's motion. UtiliCorp argued that the rate changes included in the tariff will only be in effect for a short period of time, as UtiliCorp intends to file for a general rate increase for its electric operations within three to four months. When it files for a general rate increase, UtiliCorp will seek to unify the amount of the charges and fees imposed by its SJLP and MoPub divisions. UtiliCorp states that synchronizing the charges now would allow it to avoid as much as \$100,000 of total costs that will be necessary to modify the programming and coding of its current Customer Information System to accommodate differing charges and fees for its SJLP and MoPub divisions. UtiliCorp asserts that under the circumstances, approval of its proposed rate changes would not be single issue ratemaking. In addition, UtiliCorp argued that

Public Counsel's motion was essentially moot because the Commission already approved UtiliCorp's tariff through a letter sent to UtiliCorp on March 6.

Staff, on March 19, filed its own response to Public Counsel's motion. In its response, Staff agreed with Public Counsel that the proposed tariff revisions would constitute single-issue ratemaking and that they might be detrimental to SJLP's ratepayers. As part of its response, Staff asked the Commission to consolidate this case with Case Nos. GT-2001-484 and HT-2001-485, cases established to consider similar tariffs filed by UtiliCorp for its gas and steam heating operations.

UtiliCorp's Suggestions in Opposition and Staff's response triggered additional pleadings from the parties. Public Counsel filed a reply on March 21 in which it agreed with Staff's request to consolidate, and disagreed with UtiliCorp's suggestions. UtiliCorp filed an additional reply on March 22, in which it agrees with Staff's request to consolidate, but reiterates its position that its proposed rate changes are not single issue ratemaking and that the Commission has already approved the tariffs. Staff filed a reply to UtiliCorp's Suggestions in Opposition on March 26.

There are two issues that must be addressed with regard to UtiliCorp's tariff. First, has the Commission already approved UtiliCorp's tariff? Second, would implementation of UtiliCorp's tariff constitute single-issue ratemaking?

Previous Approval of Tariff

UtiliCorp argues that the Commission has already approved its tariff because it has received a letter from the Commission, dated March 6, in which the Commission states that "the tariff filing submitted with your letter of transmittal . . . is being made effective in accordance with Section 393.140(11) RSMo 1994." UtiliCorp states that such letter is consistent with the Commission's customary practice regarding approval of tariff sheets. UtiliCorp misunderstands the meaning of the Commission's March 6 letter.

Section 393.140(11), RSMo 2000, permits a utility to file a tariff with the Commission establishing a new rate or charge with a thirty day effective date. Unless the Commission acts under Section 393.150, RSMo 2000, to suspend that rate or charge, it goes into effect on its effective date.¹ The letter that UtiliCorp received from the Commission simply notified UtiliCorp that, at the time the Commission sent the letter, it did not intend to take any action to prevent the tariff from going into effect by operation of law - specifically Section 393.140(11), RSMo 2000 - on its effective date.

The letter is not a decision or order of the Commission. And indeed, under the principles announced by the Missouri Supreme Court in the *Philipp Transit Lines* case,² it cannot be a decision or order of the Commission because it was not adopted by a majority of the Commissioners at a public agenda meeting. The tariff submitted by UtiliCorp, by its terms, does not become effective until May 1, 2001. Therefore, it is still subject to the Commission's review under Section 393.150,

¹*State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. banc 1979)

²*State ex rel. Philipp Transit Lines, Inc. v. Public Service Comm'n, et al.*, 552 S.W.2d 696 (Mo. banc 1977).

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RSMo 2000, until its effective date. The letter received by UtiliCorp cannot preclude the Commission's further review of UtiliCorp's tariff.

Single-Issue Ratemaking

The law is quite clear that when the Commission determines the appropriateness of a rate or charge that a utility seeks to impose on its customers, it is obligated to review and consider *all* relevant factors, rather than just a single factor.³ To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without recognizing counterbalancing savings in another area. Such a practice is justly considered to be single-issue ratemaking.⁴

UtiliCorp, through its proposed tariffs, seeks to change various fixed charges applied to customers of its SJLP division. Some charges would be increased, and some decreased. UtiliCorp has not submitted tariffs that would revise its rates generally. Instead, UtiliCorp requests that these changes to its rates be approved outside a general rate case. In other words, UtiliCorp asks the Commission to approve these charges without considering all relevant factors.

In order to avoid condemnation as single-issue ratemaking, UtiliCorp argues that its tariff should be approved as a matter of expediency. UtiliCorp points out that the net effect of its proposed changes would result in an increase in UtiliCorp's revenues of only about \$11,000 per year. UtiliCorp also alleges that synchronizing the charges and fees of its SJLP and MoPub divisions will allow it to avoid as much as \$100,000 of total costs required to modify the programming and coding of its current Customer Information System to accommodate differing charges and fees. UtiliCorp's practical arguments have a certain appeal. But the Commission simply does not have the authority to engage in single-issue ratemaking, and convenience, expediency, and necessity are not proper matters for consideration when determining the extent of the Commission's authority.⁵

The Commission takes seriously its obligation to consider all factors before approving any tariff that would increase the rates or charges paid by the customers of a utility. Thus, for example, the Commission recently rejected, as single-issue ratemaking, a tariff offered by a small telephone company that would have introduced a \$5.00 late payment charge.⁶ UtiliCorp asks the Commission to approve changes to its customer charges without considering all factors. The Commission does not have the authority to do so. Therefore, UtiliCorp's tariffs cannot be approved.

³*State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704 (Mo. 1957); *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979); and *Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470 (Mo. App. W.D. 1998).

⁴*Midwest Gas Users' Association* at 480.

⁵*State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979); *Kansas City v. Public Service Commission*, 301 Mo. 179, 257 S.W. 462 (banc 1923)

⁶*In the Matter of the Chapter 33 Tariff Filing of Miller Telephone Company*, Report and Order, Case No. TT-2001-257, December 12, 2000.

Because it violates the prohibition against single-issue ratemaking, the Commission is without authority to approve UtiliCorp’s tariff. Suspension of the tariff for further consideration would be pointless. For that reason the tariff submitted by UtiliCorp will be rejected. With the rejection of the tariff, there is no reason to consolidate this case with the similar cases regarding UtiliCorp’s gas and steam operations. Staff’s Motion to Consolidate will be denied.

IT IS THEREFORE ORDERED:

- 1. That the Staff of the Public Service Commission’s Motion to Consolidate is denied.
- 2. That the tariff sheets issued by UtiliCorp United Inc. on February 16, 2001 (tariff file number 200100849) with an effective date of May 1, 2001, are rejected. The tariff sheets rejected are:

P.S.C. Mo. No. 6

- 3rd Revised Sheet No. 47, Canceling 2nd Revised Sheet No. 47
- 2nd Revised Sheet No. 49, Canceling 1st Revised Sheet No. 49
- 2nd Revised Sheet No. 50, Canceling 1st Revised Sheet No. 50
- 2nd Revised Sheet No. 53.1, Canceling 1st Revised Sheet No. 53.1
- 2nd Revised Sheet No. 58.1, Canceling 1st Revised Sheet No. 58.1
- 3. That this order shall become effective on April 13, 2001.

Lumpe, Ch., and Simmons, CC., concur
Drainer, C., concurs with concurring opinion attached
Murray, C., dissents with dissenting opinion attached
Gaw, C., not participating

Woodruff, Senior Regulatory Law Judge

CONCURRING OPINION OF VICE CHAIR M. DIANNE DRAINER

I respectfully concur with the decision of the Commission. The tariff submitted by UtiliCorp clearly must be rejected as single-issue ratemaking. I write separately to address concerns raised by UtiliCorp regarding transition costs that it states it will incur if its tariff is not approved. If UtiliCorp does incur transition costs necessary to complete the merger with St. Joseph Light & Power Company, it will have the opportunity to present those costs to the Commission for consideration in an upcoming rate case. The Commission will give due consideration to those costs at the time they are presented.

Respectfully submitted.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

Today’s Order Rejecting Tariff is similar to straining out gnats and swallowing camels. The tariff sheets in this and case numbers GT-2001-484 and HT-2001-485 were for the stated purpose of making certain changes to synchronize charges

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and fees between UtiliCorp's Missouri divisions in order to avoid substantial reprogramming expense.

While some charges would be reduced, the net effect of the tariffs would be to increase revenues to the electric, gas and steam operations of UtiliCorp's St. Joseph Light & Power Division by \$11,240. UtiliCorp states that the reprogramming expense to be avoided is approximately \$100,000. Today's decision, therefore, may result in increased costs of approximately nine hundred per cent, or more.

Single-issue ratemaking can occur when consideration of some costs in isolation improperly allows an increase in rates without consideration of offsetting savings. Such a result would not be revenue neutral. In its initial recommendation for approval of these tariffs, however, Staff stated that it "considers this change to be revenue neutral as this amount is so small as to be insignificant." I concur with Staff's original reasoning.

The Utility Operations Division circulated, along with Staff's recommendation, a routing slip to the Commissioners for approval of the tariff "by delegation." All five Commissioners initialed to approve "by delegation." This action had the effect of authorizing the tariff to become effective by operation of law, which means without a Commission vote. Accordingly, on March 6, the Commission Secretary sent written notice to the company that "the tariff filing submitted . . . is being made effective in accordance with Section 393.140(11) RSMO 1994." The majority now claims, in effect, that there was no decision of the Commission because nothing was adopted by a majority of the Commissioners at a public agenda meeting. The Commission did, however, delegate authority to advise the company that the tariff would become effective by operation of law. The company was thereby placed on notice that no formal Commission action was planned and that the tariff would become effective at the expiration of the required 30-day notice period.

The Missouri statutes give the Commission the power to "authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized . . . to do or perform; provided, that no order, rule or regulation of any person employed by the commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission." 386.240 RSMO While the majority cites *Philipp Transit Lines Inc. v. Public Service Comm'n, et al.* (552 S.W. 2d 696 (Mo. Banc 1977) for the proposition that the letter to the company had no meaning because no vote was taken in a public agenda meeting, I submit that the Commission properly delegated authority to Staff to circulate tariffs recommending approval "by delegation." No vote was required, because the tariff was to be allowed to go into effect by operation of law. Express authorization for the Secretary of the Commission to advise the company that the tariff would become effective by operation of law occurred when the routing slip was circulated and initialed.

While it is true that the Commission could suspend or possibly even reject the tariff prior to the operation of law date, notwithstanding notice to the utility that the tariff would become effective, such action should not be taken, as it is here, where no substantial reason exists. Parties should be able reasonably to rely upon official correspondence issued by delegation of Commission authority.

For these reasons, I respectfully dissent.

**In the Matter of UtiliCorp United Inc.’s Tariff Filed to Update
the Rules and Regulations for Steam and to Increase the
Interest Rate Paid on Deposits, the Late Payment Charge,
the Reconnection Fee, and the Charge for Returned Checks.**

*Case No. HT-2001-485
Decided April 3, 2001*

Rates §69. A letter sent by the Commission to a utility indicating that the Commission did not intend to act to suspend a tariff before its effective date was not an approval of the tariff, and did not preclude the Commission from subsequently suspending the tariff.

Rates §62. When the Commission determines the appropriateness of a proposed rate it must consider all relevant factors, rather than just a single factor.

Rates §62. A utility’s tariff that would have changed various fixed customer charges outside the context of a general rate case was rejected as single-issue ratemaking.

ORDER REJECTING TARIFF

On February 16, 2001, UtiliCorp United Inc. filed a tariff to make changes to the interest paid on customer deposits, late payment charges, reconnection fees and charges from returned checks for customers of UtiliCorp’s St. Joseph Light & Power (SJLP) division’s steam operations. The changes proposed in the tariff are designed to conform the charges paid by customers of the SJLP division with those paid by customers of UtiliCorp’s Missouri Public Service (MoPub) division. UtiliCorp’s tariff bears an effective date of May 1, but the cover letter that accompanied the tariff requested that the Staff of the Commission send UtiliCorp the approved tariff sheets by March 19, to aid UtiliCorp in planning and implementing the changes by May 1.

On March 9, the Office of the Public Counsel filed a Motion to Dismiss or Suspend. Public Counsel argued that changes to rates included in UtiliCorp’s tariff could only be made within a general rate case. Public Counsel contended that approval of such rate changes in this tariff would constitute improper single-issue ratemaking.

On March 19, UtiliCorp filed suggestions in opposition to Public Counsel’s motion. UtiliCorp argued that the rate changes included in the tariff will only be in effect for a short period of time, as UtiliCorp intends to file for a general rate increase for its electric operations within three to four months. When it files for a general rate increase, UtiliCorp will seek to unify the amount of the charges and fees imposed by its SJLP and MoPub divisions. UtiliCorp states that synchronizing the charges now would allow it to avoid as much as \$100,000 of total costs that will be necessary to modify the programming and coding of its current Customer Information System to accommodate differing charges and fees for its SJLP and MoPub divisions. UtiliCorp asserts that under the circumstances, approval of its proposed rate changes would not be single-issue ratemaking. In addition, UtiliCorp argued that

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Public Counsel's motion was essentially moot because the Commission already approved UtiliCorp's tariff through a letter sent to UtiliCorp on March 6.

Staff, on March 19, filed its own response to Public Counsel's motion. In its response, Staff agreed with Public Counsel that the proposed tariff revisions would constitute single-issue ratemaking and that they might be detrimental to SJLP's ratepayers. As part of its response, Staff asked the Commission to consolidate this case with Case Nos. ET-2001-482 and GT-2001-484, cases established to consider similar tariffs filed by UtiliCorp for its electric and gas operations.

UtiliCorp's Suggestions in Opposition and Staff's response triggered additional pleadings from the parties. Public Counsel filed a reply on March 21 in which it agreed with Staff's request to consolidate, and disagreed with UtiliCorp's suggestions. UtiliCorp filed an additional reply on March 22, in which it agrees with Staff's request to consolidate, but reiterates its position that its proposed rate changes are not single issue ratemaking and that the Commission has already approved the tariffs. Staff filed a reply to UtiliCorp's Suggestions in Opposition on March 26.

There are two issues that must be addressed with regard to UtiliCorp's tariff. First, has the Commission already approved UtiliCorp's tariff? Second, would implementation of UtiliCorp's tariff constitute single-issue ratemaking?

Previous Approval of Tariff

UtiliCorp argues that the Commission has already approved its tariff because it has received a letter from the Commission, dated March 6, in which the Commission states that "the tariff filing submitted with your letter of transmittal . . . is being made effective in accordance with Section 393.140(11) RSMo 1994." UtiliCorp states that such letter is consistent with the Commission's customary practice regarding approval of tariff sheets. UtiliCorp misunderstands the meaning of the Commission's March 6 letter.

Section 393.140(11), RSMo 2000, permits a utility to file a tariff with the Commission establishing a new rate or charge with a thirty day effective date. Unless the Commission acts under Section 393.150, RSMo 2000, to suspend that rate or charge, it goes into effect on its effective date.¹ The letter that UtiliCorp received from the Commission simply notified UtiliCorp that, at the time the Commission sent the letter, it did not intend to take any action to prevent the tariff from going into effect by operation of law - specifically Section 393.140(11), RSMo 2000 - on its effective date.

The letter is not a decision or order of the Commission. And indeed, under the principles announced by the Missouri Supreme Court in the *Philipp Transit Lines* case², it cannot be a decision or order of the Commission because it was not adopted by a majority of the Commissioners at a public agenda meeting. The tariff submitted by UtiliCorp, by its terms, does not become effective until May 1, 2001. Therefore, it is still subject to the Commission's review under Section 393.150,

¹ *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. banc 1979)

² *State ex rel. Philipp Transit Lines, Inc. v. Public Service Comm'n, et al.*, 552 S.W.2d 696 (Mo. banc 1977).

RSMo 2000, until its effective date. The letter received by UtiliCorp cannot preclude the Commission's further review of UtiliCorp's tariff.

Single-Issue Ratemaking

The law is quite clear that when the Commission determines the appropriateness of a rate or charge that a utility seeks to impose on its customers, it is obligated to review and consider *all* relevant factors, rather than just a single factor.³ To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without recognizing counterbalancing savings in another area. Such a practice is justly considered to be single-issue ratemaking.⁴

UtiliCorp, through its proposed tariffs, seeks to change various fixed charges applied to customers of its SJLP division. Some charges would be increased, and some decreased. UtiliCorp has not submitted tariffs that would revise its rates generally. Instead, UtiliCorp requests that these changes to its rates be approved outside a general rate case. In other words, UtiliCorp asks the Commission to approve these charges without considering all relevant factors.

In order to avoid condemnation as single-issue ratemaking, UtiliCorp argues that its tariff should be approved as a matter of expediency. UtiliCorp points out that the net effect of its proposed changes would result in an increase in UtiliCorp's revenues of only about \$11,000 per year. UtiliCorp also alleges that synchronizing the charges and fees of its SJLP and MoPub divisions will allow it to avoid as much as \$100,000 of total costs required to modify the programming and coding of its current Customer Information System to accommodate differing charges and fees. UtiliCorp's practical arguments have a certain appeal. But the Commission simply does not have the authority to engage in single-issue ratemaking, and convenience, expediency, and necessity are not proper matters for consideration when determining the extent of the Commission's authority⁵.

The Commission takes seriously its obligation to consider all factors before approving any tariff that would increase the rates or charges paid by the customers of a utility. Thus, for example, the Commission recently rejected, as single-issue ratemaking, a tariff offered by a small telephone company that would have introduced a \$5.00 late payment charge.⁶ UtiliCorp asks the Commission to approve changes to its customer charges without considering all factors. The Commission does not have the authority to do so. Therefore, UtiliCorp's tariffs cannot be approved.

³ *State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704 (Mo. 1957); *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979); and *Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470 (Mo. App. W.D. 1998).

⁴ *Midwest Gas Users' Association* at 480.

⁵ *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979); *Kansas City v. Public Service Commission*, 301 Mo. 179, 257 S.W. 462 (banc 1923)

⁶ *In the Matter of the Chapter 33 Tariff Filing of Miller Telephone Company*, Report and Order, Case No. TT-2001-257, December 12, 2000.

Because it violates the prohibition against single-issue ratemaking, the Commission is without authority to approve UtiliCorp's tariff. Suspension of the tariff for further consideration would be pointless. For that reason the tariff submitted by UtiliCorp will be rejected. With the rejection of the tariff, there is no reason to consolidate this case with the similar cases regarding UtiliCorp's electric and gas. Staff's Motion to Consolidate will be denied.

IT IS THEREFORE ORDERED:

1. That the Staff of the Public Service Commission's Motion to Consolidate is denied.
2. That the tariff sheets issued by UtiliCorp United Inc. on February 16, 2001 (tariff file number 200100847) with an effective date of May 1, 2001, are rejected. The tariff sheets rejected are:

P.S.C. Mo. No. 3

- 3rd Revised Sheet No. 5, Canceling 2nd Revised Sheet No. 5

2nd Revised Sheet No. 8, Canceling 1st Revised Sheet No. 8
3. That this order shall become effective on April 13, 2001.

Lumpe, Ch., and Simmons, CC., concur
Drainer, C., concurs with concurring opinion attached
Murray, C., dissents with dissenting opinion attached
Gaw, C., not participating

Woodruff, Senior Regulatory Law Judge

CONCURRING OPINION OF VICE CHAIR M. DIANNE DRAINER

I respectfully concur with the decision of the Commission. The tariff submitted by UtiliCorp clearly must be rejected as single-issue ratemaking. I write separately to address concerns raised by UtiliCorp regarding transition costs that it states it will incur if its tariff is not approved. If UtiliCorp does incur transition costs necessary to complete the merger with St. Joseph Light & Power Company, it will have the opportunity to present those costs to the Commission for consideration in an upcoming rate case. The Commission will give due consideration to those costs at the time they are presented.

Respectfully submitted.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

Today's Order Rejecting Tariff is similar to straining out gnats and swallowing camels. The tariff sheets in this and case numbers GT-2001-484 and ET-2001-482 were for the stated purpose of making certain changes to synchronize charges and fees between Utilicorp's Missouri divisions in order to avoid substantial reprogramming expense.

While some charges would be reduced, the net effect of the tariffs would be to increase revenues to the electric, gas and steam operations of UtiliCorp's St. Joseph Light & Power Division by \$11,240. UtiliCorp states that the reprogramming expense to be avoided is approximately \$100,000. Today's decision, therefore, may result in increased costs of approximately nine hundred per cent, or more.

Single-issue ratemaking can occur when consideration of some costs in isolation improperly allows an increase in rates without consideration of offsetting savings. Such a result would not be revenue neutral. In its initial recommendation for approval of these tariffs, however, Staff stated that it "considers this change to be revenue neutral as this amount is so small as to be insignificant." I concur with Staff's original reasoning.

The Utility Operations Division circulated, along with Staff's recommendation, a routing slip to the Commissioners for approval of the tariff "by delegation." All five Commissioners initialed to approve "by delegation." This action had the effect of authorizing the tariff to become effective by operation of law, which means without a Commission vote. Accordingly, on March 6, the Commission Secretary sent written notice to the company that "the tariff filing submitted . . . is being made effective in accordance with Section 393.140(11) RSMO 1994." The majority now claims, in effect, that there was no decision of the Commission because nothing was adopted by a majority of the Commissioners at a public agenda meeting. The Commission did, however, delegate authority to advise the company that the tariff would become effective by operation of law. The company was thereby placed on notice that no formal Commission action was planned and that the tariff would become effective at the expiration of the required 30-day notice period.

The Missouri statutes give the Commission the power to "authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized . . . to do or perform; provided, that no order, rule or regulation of any person employed by the commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission." 386.240 RSMO While the majority cites *Philipp Transit Lines Inc. v. Public Service Comm'n, et al.* (552 S.W. 2d 696 (Mo. Banc 1977) for the proposition that the letter to the company had no meaning because no vote was taken in a public agenda meeting, I submit that the Commission properly delegated authority to Staff to circulate tariffs recommending approval "by delegation." No vote was required, because the tariff was to be allowed to go into effect by operation of law. Express authorization for the Secretary of the Commission to advise the company that the tariff would become effective by operation of law occurred when the routing slip was circulated and initialed.

While it is true that the Commission could suspend or possibly even reject the tariff prior to the operation of law date, notwithstanding notice to the utility that the tariff would become effective, such action should not be taken, as it is here, where no substantial reason exists. Parties should be able reasonably to rely upon official correspondence issued by delegation of Commission authority.

For these reasons, I respectfully dissent.

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In the Matter of the Petition of the North American Numbering Plan Administrator, on Behalf of the Missouri Telecommunications Industry, for Approval of NPA Relief Plan for the 314 and 816 Area Codes.*

*Case No. TO-2000-374
Decided April 17, 2001*

Telecommunications §6. The FCC has plenary authority over the North American Numbering Plan.

Telecommunications §8. The Commission ordered that the permissive dialing and mandatory dialing dates for the 314 NPA (557 overlay) shall be extended until January 1, 2002, and to May 5, 2002, respectively. The Commission ordered that the permissive dialing and mandatory dialing dates for the 816 NPA (975 overlay) shall be extended until May 5, 2002, and September 8, 2002, respectively.

**ORDER EXTENDING THE 314 NPA AND 816 NPA
RELIEF PLAN IMPLEMENTATION DATES**

On October 24, 2000, the Commission issued its Report and Order (R&O) adopting an all services distributed overlay as the method of relief for the 314 and 816 Numbering Plan Areas (NPAs). The R&O established technical and planning committees for each NPA to develop relief implementation plans and schedules. The R&O required a consensus plan and schedule to be filed and allowed for responses to the proposed plans and schedules. Plans and responses were filed. After considering these matters, the Commission approved implementation plans for the 314 NPA on December 26, 2000, and for the 816 NPA on February 15, 2001.

In light of recent developments, the Office of the Public Counsel has filed separate motions for modification of the implementation dates for each NPA, filing on March 26, 2001, for the 816 NPA and on March 27, 2001, for the 314 NPA. The Commission's Staff and Southwestern Bell Telephone Company (SWBT) each filed responses on April 5, 2001.

The information presented by Public Counsel, Staff and SWBT show that the rate of new code assignments has moderated and that codes previously assigned to carriers but not activated are being reclaimed for re-assignment. As a result numbering resources are not being exhausted as quickly as when this case was initiated or as quickly as shown by available data at the time the implementation plans were approved.

Public Counsel proposed postponing relief implementation dates until available codes fell to specific levels. Staff and SWBT proposed extending the implementation dates by seven months. Staff further recommended that the

*See pages 82, 500, 503 and 549 for other orders in this case. In addition, see pages 367 and 499, Volume 9, MPSC 3d for other orders in this case.

Commission direct the technical committees for each NPA to file additional information no later than August 31, 2001, to determine whether relief may be extended again for either of the NPAs.

In the R&O issued on October 24, 2000, the Commission ordered implementation of numbering resource conservation and management strategies, including rate center consolidations in the 816 NPA and reclamation of un-activated central office codes throughout the state. The R&O implemented newly delegated state authority from the Federal Communications Commission (FCC). The FCC has plenary authority over the North American Numbering Plan. Many of the strategies adopted by the Commission in the R&O were not available to Missouri until the FCC issued its orders on March 31 and July 20, 2000, *In the Matter of Numbering Resource Optimization*, CC Docket Nos. 99-200 and 96-98.

The Commission stated in its R&O (p. 18) that if numbering resources were used more efficiently the life of NPA codes could be greatly extended and the expense and burden of NPA relief delayed or avoided. It is apparent that the Commission's actions are having a positive impact on the conservation and management of Missouri's numbering resources.

The Commission finds that the implementation relief dates for the 314 NPA and the 816 NPA shall be extended and that the technical committees and Staff shall each file additional information no later than August 31, 2001, regarding further extension of the relief dates. Other parties in this case may make similar filings or respond to the filings by Staff and the technical committees.

IT IS THEREFORE ORDERED:

1. That the permissive dialing and mandatory dialing dates for the 314 NPA (557 overlay) shall be extended until January 1, 2002, and to May 5, 2002, respectively.
2. That the permissive dialing and mandatory dialing dates for the 816 NPA (975 overlay) shall be extended until May 5, 2002, and to September 8, 2002, respectively.
3. That the technical implementation subcommittees for the 314 and 816 NPAs shall file reports no later than August 31, 2001, providing information to determine whether relief may be extended again for either of the NPAs. Proposed extension dates, if any, shall be suggested.
4. That Staff shall file a report no later than August 31, 2001, providing information to determine whether relief may be extended again for the 314 NPA or the 816 NPA. Alternatively, Staff may indicate its agreement or concurrence in the reports filed by the technical implementation subcommittees.
5. That other parties to this case may file similar reports no later than August 31, 2001, providing information to determine whether relief may be extended again for the 314 NPA or the 816 NPA.
6. That any responses to code relief extension reports may be filed no later than September 7, 2001.
7. That this order shall become effective on April 26, 2001.

Lumpe, Ch., Drainer, Murray, Simmons, and Gaw, CC., concur

Thornburg, Regulatory Law Judge

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In the Matter of Laclede Gas Company's Experimental Price Stabilization Fund.**Case No. GO-2000-394**Decided April 17, 2001*

Gas §1. The Commission denied Staff's motion to suspend the company's tariff and instead approved the proposed tariff filing. Staff had requested that the Commission suspend the tariff pending additional study and evaluation. The proposed tariff was designed to reduce the Required Price Protection Volume percentages in the company's Experimental Price Stabilization Program. The Commission found that delaying the implementation of the tariff as requested by Staff was likely to threaten the viability of the Experimental Price Stabilization Program. The Commission also noted that the program would terminate on September 30, 2001.

Gas §17. The Commission denied Staff's motion to suspend the company's tariff and instead approved the proposed tariff filing. The proposed tariff was designed to reduce the Required Price Protection Volume percentages in the company's Experimental Price Stabilization Program from 70% to 40% for the upcoming winter in order to permit a corresponding reduction in the program's Target Strike Price and Catastrophic Price Level. The Commission found that delaying the implementation of the tariff as requested by Staff was likely to threaten the viability of the Experimental Price Stabilization Program. The Commission also noted that the program would terminate on September 30, 2001.

ORDER DENYING MOTION TO SUSPEND AND APPROVING TARIFF

On March 21, 2001, Laclede Gas Company (Laclede) filed its First Revised Tariff Sheet No. 28-g. Laclede indicates that the purpose of the tariff filing is to reduce the Required Price Protection volume percentages in the company's Experimental Price Stabilization Program (PSP) from 70 percent to 40 percent for the upcoming winter in order to permit a corresponding reduction in the program's Target Strike Price (TSP) and Catastrophic Price Level (CPL). Laclede also filed a motion for expedited treatment, requesting that the revised tariff sheet be made effective on April 1, 2001, or as soon thereafter as reasonably practicable.

On March 27, 2001, Staff filed a recommendation to suspend the revised tariff sheet. Staff argued that the revised tariff requires additional study and evaluation and should not be approved without further proceedings. Staff states that both Public Counsel and Staff need to analyze whether lower strike prices for smaller volumes would produce better overall strategies. Staff indicates that there has not been an opportunity to discuss the benefits or disadvantages of other available alternatives, nor has there been an opportunity for analysis or evaluation by the Commission Staff, the Office of the Public Counsel, and other interested parties.

Laclede filed its response to Staff's recommendation to suspend on April 4, 2001. Laclede states that the proposed tariff would permit the company to continue

*Please see pages 79 and 210 for other orders in this case.

its efforts to line up price protection for its customers next winter at prices more favorable than those that would prevail in the absence of the filing. In addition, approving the tariff would not preclude the parties from examining, as Staff suggests, the issue of whether even lower strike prices on even fewer volumes might be appropriate for this winter.

The Commission has reviewed the proposed First Revised Tariff Sheet No. 28-g, Staff's motion to suspend, Laclede's response, and the official case file. Delaying the implementation of the tariff, as requested by Staff, is likely to threaten the viability of the Experimental Price Stabilization Program. The Commission also notes that the program as currently structured terminates on September 30, 2001. Thus, the Commission determines there is not sufficient reason to suspend the tariff. In addition, the Commission finds that there is good cause to permit the proposed tariff to become effective in less than 30 days. The Commission notes that Laclede has expressed a willingness to explore with Staff and Public Counsel the possibility of seeking a further reduction in the TSP and these percentages in the future. The Commission encourages Laclede, Staff, and Public Counsel to diligently continue discussions regarding these issues.

IT IS THEREFORE ORDERED:

1. That the Staff's Recommendation to Suspend Tariff, filed on April 4, 2001, is denied.
2. That the proposed tariff (Tariff No. 200100962), filed by Laclede Gas Company on March 21, 2001, is approved to become effective on April 18, 2001. The approved tariff sheet is:

P.S.C. MO. No. 5 Consolidated

First Revised Sheet No. 28-g CANCELLING Original Sheet No. 28-g

3. That this order shall become effective on April 18, 2001.

Lumpe, Ch., Drainer, Murray, Simmons, and Gaw, CC., concur.

Ruth, Regulatory Law Judge

**In Re: Purchase of Davis Water System Public Water Supply
District No. 4 of Wayne and Butler Counties, Applicant.**

Case No. WM-2001-463
Decided May 1, 2001

Water §4. The Commission approved the sale of a small, privately owned water system to a newly created public water supply district after finding that the sale would not be detrimental to the public interest.

ORDER APPROVING TRANSFER OF ASSETS

On February 23, 2001, Public Water Supply District No. 4 of Wayne and Butler Counties (District No. 4) filed an Application for Approval and Authority to Transfer Assets. On March 26, District No. 4 filed a First Amended Application for Approval and Authority to Transfer Assets. The amended application corrected some deficiencies in the original application but did not change its substance. District No. 4 is a rural Public Water Supply District, recently formed, that is in the process of obtaining funding for the construction and operation of a new waterworks system in the Wappapello, Missouri, area. District No. 4 seeks authority to acquire all of the assets of the Davis Water System from its current owner, KMB Utility Corporation. The Davis Water System is a small, privately owned water system located in Wappapello, Missouri, and is subject to the Commission's jurisdiction.

On March 6, the Commission issued an order directing that notice of District No. 4's Application be given to the County Commissions of Wayne and Butler Counties, to the city government of Wappapello, Missouri, to the Missouri Department of Natural Resources, to the members of the General Assembly who represent Wayne and Butler Counties, and to the newspapers that serve Wayne and Butler Counties. The order and notice directed any person wishing to intervene to file an application to do so no later than March 26, 2001. The Commission's order of March 6 also added KMB Utility Corporation as a party to this case.

No requests for intervention have been received. No party has requested a hearing. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.¹ Since no one has requested a hearing, the Commission may grant the relief requested based on the verified application.

On April 23, Staff filed a Recommendation and Memorandum recommending that the Commission approve the transfer of the assets of the Davis Water System to District No. 4. Staff indicates that the Davis Water System serves a recreational development near Lake Wappapello. Staff indicates that the Davis Water System

¹*State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 Mo. App. 1989).

has had a history of problems since its inception and is currently in need of substantial improvements. District No. 4 told Staff that it has no plans to increase water rates until either substantial additional plant is constructed or major unplanned repairs or upgrades become necessary. As a political subdivision, District No. 4 will not be subject to regulation by the Commission; the board of directors of District No. 4 will decide upon future rate increases.

Staff believes that District No. 4 is capable of operating the Davis Water System and that the sale of the assets of the Davis Water System to District No. 4 would not be detrimental to the public interest. Staff recommends that the sale of the assets of the Davis Water System to District No. 4 be approved.

The Commission has considered the Application along with Staff's recommendation and concludes that the Application for Approval and Authority to Transfer Assets should be granted. The Commission will, by further order, cancel the certificate of service authority held by KMB Utility Corporation with respect to the Davis Water System, along with the tariff on file pertaining to the Davis Water System, upon completion of the transfer of assets.

IT IS THEREFORE ORDERED:

1. That KMB Utility Corporation is authorized to transfer the assets of the Davis Water System to Public Water Supply District No. 4 of Wayne and Butler Counties.
2. That upon the transfer of the assets of the Davis Water System to Public Water Supply District No. 4 of Wayne and Butler Counties, KMB Utility Corporation is authorized to cease providing water in the area served by the Davis Water System.
3. That KMB Utility Corporation and Public Water Supply District No. 4 of Wayne and Butler Counties shall file, in this case file, a notice informing the Commission of the completion of the transaction within five days after closing of the transaction transferring the assets of the Davis Water System.
4. That this order shall become effective on May 11, 2001.

Lumpe, Ch., Drainer, Murray, Simmons and Gaw, CC., concur

Woodruff, Senior Regulatory Law Judge

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**In the Matter of the Petition of Fidelity Communication Services
III, Inc., Requesting Arbitration of Interconnection Agree-
ment Between Applicant and Southwestern Bell Telephone
Company in the State of Missouri Pursuant to Section 252
(b)(1) of the Telecommunications Act of 1996.**

*Case No. TO-2001-416
Decided May 1, 2001*

Telephone §12. The federal Telecommunications Act of 1996 presents set time frames within which the Commission may resolve issues presented for arbitration. Where the parties have agreed to a settlement, Commission will not delay issuing its arbitration order because of the federal deadline.

Telephone §12. Under the federal Telecommunications Act of 1996, after an arbitrated interconnection agreement is filed with the Commission, the Commission has only 30 days to act to approve or reject the agreement. The Commission directs that the agreement be submitted to its Staff prior to filing to aid in the Commission's review.

**ORDER RESOLVING ISSUES PRESENTED
FOR ARBITRATION AND APPROVING STIPULATION**

On January 26, 2001, Fidelity Communication Services III, Inc. (Fidelity) filed its application for arbitration with the Commission pursuant to the Telecommunications Act of 1996 (the Act). The application requested the Commission to arbitrate open issues related to Fidelity's request for an interconnection agreement with Southwestern Bell Telephone Company (SWBT). The application presented an issue regarding the proposed length of term of the agreement and an issue regarding restrictions on reselling telecommunications services to affiliate entities.

On March 7, 2001, the parties filed a joint motion to remove the issue regarding the length of term of the agreement. The parties stated that this issue was agreed and resolved.

On April 13, 2001, Fidelity and SWBT filed their Stipulation of the Parties and Request to Suspend Procedural Schedule. (Attachment A to this order.) Fidelity and SWBT stated that they had come to an agreement on the substantive terms to an interconnection agreement and resolved the one remaining issue presented for arbitration.

Under the proposed settlement, Fidelity will adopt SWBT's Missouri 271 Agreement (M2A) that includes an agreed upon amendment. The specific provision and wording for the proposed amendment is set out in the stipulation. SWBT and Fidelity requested that the Commission suspend the procedural schedule, including cancellation of the hearing scheduled for April 18, 2001.

On April 16, 2001, the Commission suspended the procedural schedule for this arbitration and canceled the arbitration hearing set for April 18, 2001. The

Commission directed its Staff to file a response to the stipulation no later than April 19, 2001. The Commission allowed until April 23, 2001, for the parties to reply to Staff's response.

Staff filed its response on April 17, 2001, stating that it had no objections to the terms of the stipulation presented by the parties. No reply to the Staff response was filed.

An arbitration proceeding under the federal Telecommunications Act of 1996 presents set time frames within which the Commission may arbitrate disputes. In this case, the issues presented must be resolved no later than May 23, 2001. Once an arbitration order is entered, the parties are not limited in the timing for filing an agreement. However, once an agreement is filed, the Commission has only 30 days to consider whether to approve or reject the agreement.

The stipulation of the parties suggests that if Fidelity successfully adopts an amended M2A that Fidelity will withdraw its arbitration request. The Commission, however, will not delay in issuing its arbitration order because of the pending May 23rd deadline. If Fidelity does adopt or file an amended M2A outside of this arbitration case, it should notify the Commission that it is withdrawing its arbitration request and that a final interconnection agreement will not be filed in this proceeding.

The Commission, being fully advised on the premises, finds that each of the issues presented for resolution in this arbitration have been resolved by the mutual consent and stipulation of Fidelity and SWBT. The terms of the interconnection agreement are fully described by reference or are specifically set out in the stipulation filed by the parties on April 13, 2001. The Commission finds further that the stipulation should be approved and the issues presented for arbitration resolved as presented by the parties.

IT IS THEREFORE ORDERED:

1. That the mutual agreements and the stipulation of Fidelity Communication Services III, Inc., and Southwestern Bell Telephone Company resolving the issues presented for arbitration for an interconnection agreement set out and described in Attachment A are approved by the Commission in resolution of the issues presented for arbitration.
2. That Fidelity Communication Services III, Inc., and Southwestern Bell Telephone Company shall submit their executed interconnection agreement to the Commission's Staff 15 days prior to filing it for the Commission's final review and approval in this arbitration proceeding.
3. That the Staff of the Missouri Public Service Commission shall submit its recommendations to the Commission concerning approval or rejection of the arbitrated interconnection agreement five days after the interconnection agreement is filed in this case for the Commission's final review and approval.
4. That if Fidelity Communication Services III, Inc., and Southwestern Bell Telephone Company reach an interconnection agreement through negotiation or by adoption, in lieu of filing an arbitrated agreement in this case, that Fidelity Communication Services III, Inc., shall file its notice in this case advising the Commission of the same and advising the Commission whether any further proceedings in this case are required; and further, whether this arbitration case should be closed.

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5. Fidelity Communication Services III, Inc., shall file a status report in this case not later than 60 days from the date of issue of this order if it has not filed either an interconnection agreement or a notice in this case as described above.
6. That this order shall become effective on May 1, 2001.

Lumpe, Ch., Drainer, Murray, Simmons and Gaw, CC., concur

Thornburg, Regulatory Law Judge

**In the Matter of the Investigation into the Effective Availability
for Resale of Southwestern Bell Telephone Company's
Local Plus Service by Interexchange Companies and Facili-
ties-Based Competitive Local Exchange Companies.***

*Case No. TO-2000-667
Decided May 1, 2001*

Telecommunications §36. Southwestern Bell Telephone Company (SWBT) was ordered to make its Local Plus calling plan service available for resale by facility-based carriers that purchase unbundled switching from SWBT, to prevent SWBT from underpricing the service to the detriment of its competition.

Telecommunications §36. Southwestern Bell Telephone Company (SWBT) was ordered to make its Local Plus calling plan service available for resale by facility-based carriers that utilize their own switch, to prevent SWBT from underpricing the service to the detriment of its competition.

Telecommunications §39. Southwestern Bell Telephone Company (SWBT) was ordered to pay terminating access to third party LECs when reselling its Local Plus calling plan service to facility-based carriers that purchase unbundled switching from SWBT.

Telecommunications §39. Southwestern Bell Telephone Company was ordered to pay terminating access to third party LECs when reselling its Local Plus calling plan service to facility-based carriers that utilize their own switch.

APPEARANCES

Paul G. Lane, General Counsel, and *Leo J. Bub*, Senior Counsel, Southwestern Bell Telephone Company, One Bell Center, Room 3518, St. Louis, Missouri 63101 for Southwestern Bell Telephone Company.

W.R. England, III, Attorney at Law, and *Brian T. McCartney*, Attorney at Law, 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102-0456 for The Small Telephone Company Group.

*On May 31, 2001, the Commission denied an application for rehearing in this case. On June 22, 2001, this case was appealed to Cole County Circuit Court (01CV324534).

Craig Johnson, Attorney at Law, Andereck, Evans, Milne, Peace & Johnson
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REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

Procedural History

The Commission created this case to investigate the effective availability for resale of Southwestern Bell Telephone Company's (SWBT's) Local Plus service by interexchange carriers (IXCs) and facilities-based competitive local exchange companies (CLECs). The Commission issued an order on April 20, 2000, making SWBT a party and directing that notice be sent to all telecommunications companies in the state of Missouri. Any party wishing to intervene was directed to file an application no later than May 10, 2000.

Timely applications to intervene were received from The Missouri Independent Telephone Company Group of Local Exchange Companies (MITG),¹ The Small Telephone Company Group (STCG),² and AT&T Communications of the Southwest, Inc. (AT&T). The Commission issued an order on May 24, 2000, permitting intervention by MITG, STCG and AT&T. On June 22, 2000, ALLTEL Communications, Inc., (ALLTEL) filed an Application to Intervene Out of Time for Good Cause.

A prehearing conference was held on June 27, 2000, at which SWBT, MITG, STCG, ALLTEL, and the Staff of the Commission (Staff) appeared and participated. On June 28, the Commission issued an order granting ALLTEL's application to intervene.

¹ The MITG includes the following members: Alma; Chariton Valley; Choctaw; Mid-Missouri; Modern; MoKan Dial; and Northeast Missouri Telephone Companies.

² The STCG includes the following members: BPS Telephone Company; Cass County Telephone Company; Citizens Telephone Company; Craw-Kan Telephone Cooperative, Inc.; Ellington Telephone Company; Farber Telephone Company; Fidelity Telephone Company; Goodman Telephone Company, Inc.; Granby Telephone Company; Grand River Mutual Telephone Corporation; Green Hills Telephone Corporation; Holway Telephone Company; Iamo Telephone Company; Kingdom Telephone Company; KLM Telephone Company; Lathrop Telephone Company; Le-Ru Telephone Company; McDonald County Telephone Company; Mark Twain Rural Telephone Company; Miller Telephone Company; New Florence Telephone Company; New London Telephone Company; Orchard Farm Telephone Company; Oregon Farmers Mutual Telephone Company; Ozark Telephone Company; Peace Valley Telephone Company; Rock Port Telephone Company; Seneca Telephone Company; Steelville Telephone Exchange, Inc.; and Stoutland Telephone Company.

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In its June 28th order, the Commission also directed the parties to file, no later than July 7, written suggestions regarding any limitations that the Commission should place on the issues to be addressed in this case. In their applications to intervene, MITG and STCG indicated that they wished to raise issues regarding payment of terminating compensation, traffic routing and record exchange. These issues appeared to be beyond the range of issues contemplated by the Commission when the case was created. After considering suggestions from the parties, as well as the responses of the parties to those suggestions, the Commission, on August 22, 2000, issued an order recognizing the issues raised by MITG and STCG and declining to act to limit the issues to be considered.

On September 7, 2000, the Commission established a procedural schedule that directed the parties to file direct, rebuttal and surrebuttal testimony and set this case for evidentiary hearing on January 10, 11 and 12, 2001. On October 19, 2000, AT&T notified the Commission that it was withdrawing from participation in this case. A hearing was held on January 10 and 11, 2001. The parties submitted initial briefs on March 23, 2001, and reply briefs on April 6, 2001.

Discussion

SWBT takes the position that it has made its Local Plus service fully available for resale by IXCs and CLECs. It points to the fact that 16 CLECs in Missouri are currently reselling Local Plus as proof that Local Plus is available for resale. SWBT further contends that although no IXC is currently reselling Local Plus, appropriate systems are in place for them to resell that service if they choose to do so. Finally, SWBT concedes that no CLEC has sought to provide Local Plus in Missouri through unbundled network elements (UNEs); but SWBT indicates that it is willing to provide the necessary switching facilities, as an UNE, to any CLEC that wants to provide a Local Plus type service. SWBT, however, contends that it need not, and indeed cannot, permit a CLEC that provides services to a customer through UNEs or through its own facilities to resell SWBT's Local Plus service to that customer.

ALLTEL, which is a facilities based CLEC, argued that it must be permitted to resell Local Plus to its customers that it serves through its own facilities. ALLTEL asserts that if it is not permitted to resell Local Plus under those circumstances it will be placed at a severe competitive disadvantage.

The small telephone companies that are members of the STCG and the MITG are not themselves seeking to resell Local Plus. They are, rather, incumbent local exchange carriers serving their own exchanges. They support the ability of CLECs providing services through UNEs or through their own facilities to resell Local Plus because they are concerned about obtaining payment of terminating access charges for Local Plus calls terminating in their exchanges. For Local Plus calls, even those resold by a reseller CLEC, SWBT pays the terminating access charges. If UNE providers are not permitted to resell Local Plus and instead must provide their own Local Plus type service, the small telephone companies are concerned that they might not be paid terminating access for Local Plus type calls coming from those CLECs.

Staff and the Office of the Public Counsel (Public Counsel) contend that SWBT should be required to permit CLECs providing service through UNEs or through

their own facilities to resell its Local Plus service. However, Staff would require the CLEC reselling Local Plus in those circumstances to pay terminating access to third party LECs.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

The parties identified several issues for resolution by the Commission. Each of those issues will be addressed in turn.

1) Is SWBT properly making Local Plus service available for resale to IXC's and CLECs?

SWBT's Local Plus service is an optional, calling plan available to single-party residential and business customers. For a fixed monthly rate, subscribers to Local Plus can make unlimited calls to all numbers within the Local Access and Transportation Area (LATA). The Commission has described Local Plus as a hybrid service because it has characteristics of both local and toll.

Local Plus is like toll in that, as a general rule, all Local Plus calls would be classified as intraLATA toll, except for the fact that the customer subscribes to Local Plus. In recognition of their toll characteristics, the Commission has ordered that Local Plus calls require payment of terminating access compensation, rather than application of reciprocal compensation arrangements as for local calls.

Local Plus is like local in that it is offered on a flat rate, rather than on a measured, per-minute-of-use rate. Furthermore, the dialing pattern used for local plus calls is the same as that used for local calls. In other words, the Local Plus customer does not need to dial a 1 in order to complete the call. For purposes of network transport, Local Plus calls are handled on the Feature Group C network, also known as the LEC to LEC network, rather than the Feature Group D network, which is used for interexchange, toll traffic.

Local Plus was intended as a substitute for Community Optional Service, an earlier service that permitted flat-rate extended local calling. A great deal of public dissatisfaction resulted when Community Optional Service was eliminated, but Local Plus proved to be a popular and valued replacement. Certainly the Commission and the public want to see that service continued.

When the Commission set out the conditions under which SWBT would be permitted to offer Local Plus, it recognized that Local Plus was a unique hybrid service and imposed certain requirements on SWBT. The companies that sought to serve local phone customers in competition with SWBT were concerned that SWBT would offer Local Plus at a rate below its actual costs, particularly with regard to the imputed cost of terminating access, thus making it impossible for other carriers to effectively compete with SWBT. The Commission chose not to attempt to impute access charges on the cost of provisioning of Local Plus. Instead the

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Commission found that imputation of access charges would not be necessary if this type of service was made available for resale at a wholesale discount to CLECs and IXC's. Specifically, the Commission found that "[I]n order to enable customers to obtain this type of service by using the same dialing pattern, the dialing pattern functionality should be made available for purchase to IXC's and CLECs on both a resale and unbundled network element basis".³ If SWBT were required to make Local Plus freely available for resale the risk that predatory pricing would endanger competition would be reduced.

No party disputes that SWBT has made Local Plus freely available for resale by CLEC's that want to simply resell the Local Plus service. At the time of the hearing 16 CLECs were reselling Local Plus. SWBT, however, limits resale to CLECs or IXC's that are operating as pure resellers. SWBT denies that it has an obligation to permit resale of Local Plus by CLECs or IXC's that provide service to a customer through the purchase of UNE's or through the provider's separate facilities. Indeed, SWBT argues that "resale" is by definition impossible in such a situation.

SWBT bases its argument on the distinction made in the Telecommunications Act of 1996 between resale of services and provision of service through UNEs or separate facilities. SWBT suggests that, by definition, a company providing certain services through purchase of UNE's, or through its own facilities, cannot also resell those services. Of course, such distinctions do exist, but they are not particularly relevant in this situation.

The Commission is not concerned with placing particular services and providers within a particular box. Instead, the Commission wants to assure that Local Plus is made available to Missouri consumers, without stifling competition for the local telephone market. Local Plus is a very popular service for SWBT. It also has the potential to be a powerful tool to prevent SWBT's competitors from offering this service in the basic local telephone market.

Local Plus has the potential to stifle competition because of SWBT's dominant position in the marketplace. SWBT serves many customers in many exchanges. As a result there is a very good possibility that a SWBT customer who subscribes to Local Plus will place a Local Plus call that terminates with another SWBT customer. SWBT is not required to pay terminating access charges when it terminates a call to itself. Furthermore, the Commission has not required SWBT to pass an imputation test to determine whether the cost of such terminating access charges are covered by the rate it charges for Local Plus service. Of course, a competing local service provider also would not have to pay terminating access to itself if one of its customers places a call to another of its customers using a service similar to Local Plus. However, the chance that a customer of a company with relatively few customers will choose to call another customer of that company is relatively small.

³ *In the Matter of Southwestern Bell Telephone Company's Tariff Revisions Designed to Introduce a LATA-wide Extended Area Service (EAS) Called Local Plus, and a One-Way COS Plan*, Case No. TT-98-351, Report and Order issued September 17, 1998, at 39-40.

Because it does not have to pay terminating access on a larger percentage of Local Plus calls than would any of its potential competitors, SWBT can potentially price its Local Plus service at a level that cannot be matched by its competitors; and potentially lower than its actual cost of providing that service. For that reason the Commission, in Case No. TT-98-351, required SWBT to make Local Plus available for resale by its competitors. If Local Plus can be resold by SWBT's competitors at an appropriate wholesale discount, the risk of anti-competitive effects from Local Plus is eliminated.

SWBT's position of allowing resale only by pure resellers would result in Local Plus potentially being used as an anti-competitive barrier for SWBT's UNE and facility-based competitors. SWBT suggests that UNE and facility-based competitors could avoid having to pay terminating access charges by simply choosing not to provide service to a particular customer desiring a Local Plus type service through its own facilities and instead purely reselling Local Plus. However, if a competitor were required to make such a choice, it would discourage competitors from making the capital investments needed to become UNE or facility-based competitors. As previously stated the Commission intended to foster, not discourage, competition when it approved SWBT's tariff to provide Local Plus. Therefore, the Commission will clearly state that if SWBT wants to provide Local Plus service without meeting an imputation test, it must resell that service to all its competitors, including those competitors who provide service to a customer through the use of UNEs or separate facilities.

2) Who should be responsible for paying terminating access charges to third party LECs when:

a) Local Plus is being offered through pure resale of SWBT's retail Local Plus Offering?

All the parties agree that when SWBT resells Local Plus to a pure reseller CLEC it is responsible for paying terminating access charges to third party LECs. It is presumed that SWBT took this factor into account when it established the price that it charges its customers for Local Plus. SWBT is compensated for these costs when the reselling company pays SWBT the discounted wholesale rate for the Local Plus service.

b) Local Plus is being offered through a facility-based carrier's purchase of unbundled switching from SWBT?

If a competing carrier purchases switching from SWBT as a UNE, it can choose to configure that switch in such a way as to provide a competing calling plan that would be similar to Local Plus as offered by SWBT. If a competing carrier were to choose to offer such a calling plan, it would, of course, be responsible for paying terminating access to third party LECs as well as to SWBT when those Local Plus type calls are terminated by those other companies.

The situation is different, however, when the competing telephone company chooses to resell Local Plus rather than create its own calling plan. In that circumstance SWBT is responsible for paying terminating access to third party LECs in the same way that it pays those costs in a pure resale situation. That result is not unfair to SWBT because it will be paid the discounted wholesale rate for Local Plus service by the competing telecommunications company. Again, it is pre-

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sumed that the rate SWBT charges its customers for Local Plus service will cover the costs of providing that service, including payment of terminating access. Therefore, the wholesale rate, discounted for marketing costs, should be sufficient to compensate SWBT.

c) Local Plus is being offered through a facility-based carrier's own switch?

When a facility-based carrier proposes to resell Local Plus utilizing its own switch, it seems at first glance that such a plan is neither reasonable nor feasible. A facility-based carrier, using its own switch, might serve its customer with no connection whatsoever with SWBT. It could certainly establish its own Local Plus type service. A customer of such a service could phone a customer served by a third party LEC or by the facility-based carrier itself and SWBT might never touch the call. In that circumstance it would seem to be unfair to require SWBT to pay the terminating access charges on such a call.

However, the facility-based carrier utilizing its own switch is still facing the same competitive disadvantage that is suffered by the UNE based provider that purchases a switch from SWBT. It still cannot effectively compete with SWBT because of SWBT's ability to avoid paying terminating access charges due to its large number of customers. As previously indicated, if SWBT resells Local Plus it is obligated to pay the terminating access charges that result from the use of that service. If the facility-based carrier is allowed to resell SWBT's local plus service then the competitive disadvantage disappears. Again, as determined for the UNE based provider, the rate SWBT charges its customers for Local Plus service is presumed to cover the costs of providing that service, including payment of terminating access. Therefore, the wholesale rate, discounted for marketing costs, should be sufficient to compensate SWBT.

The facility-based carrier utilizing its own switch does have one difficulty that is not faced by a UNE based carrier; how to get the call from its switch into SWBT's switch to be completed as a Local Plus call? SWBT initially argued that such a maneuver is not technically possible. However, Martin Detling, witness for ALLTEL, a company that wants to resell Local Plus while utilizing its own switch, explained that ALLTEL's switch could initially process the call from ALLTEL's customer, determine that it was a Local Plus call and then route the call to SWBT's switch, to be sent by SWBT to its destination over the Feature Group C network. SWBT did not argue that this arrangement would be technically impossible; but did contend that such an arrangement would be unfair to SWBT because it would depend upon ALLTEL's correctly identifying the calls that it sends to SWBT as Local Plus calls. If ALLTEL were less than honest, it could misidentify non-Local Plus calls and send them over the connection, requiring SWBT to pay the terminating access charge. SWBT indicated that it would have no way to determine that it was being cheated. SWBT also asserted that any such connection would require an amendment to its interconnection agreement with the facility-based carrier.

The Commission concludes that the ability of a facility-based provider to resell Local Plus using its own switch is vital to that provider's ability to compete with SWBT. The interconnection needed to make such resale possible is technically feasible and it should be possible for the parties to establish the necessary business relationship to share the billing information required to make that

interconnection work. The details of such interconnection are the proper subject for negotiation between SWBT and any company seeking to resell Local Plus while utilizing its own switch. Therefore, the Commission will not, in this order, attempt to establish the details of such interconnection.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

SWBT is a "Telecommunications Company" as that term is defined in Section 386.020(51), RSMo 2000, and is subject to the jurisdiction of the Commission pursuant to Section 386.250(2), RSMo 2000.

Section 386.330, RSMo 2000, grants the Commission the authority to "investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any telecommunications company subject to its supervision, . . ."

47 U.S.C. 251(c)(4)(A) imposes a duty upon SWBT, as a telecommunications carrier, to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."

47 U.S.C. 251(c)(4)(A) provides that SWBT, as a telecommunications carrier, shall not "impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service . . ."

Based on the evidence, the arguments of the parties, the Commission's Findings of Fact and its Conclusions of Law, the Commission determines that SWBT has not made its Local Plus service available for resale by companies providing service to their customers through the use of UNE's or through the use of their own facilities. SWBT will be directed to make Local Plus available for resale by such companies.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone Company shall make its Local Plus service available for resale by companies providing service to their customers through the purchase of switching from Southwestern Bell Telephone Company as an unbundled network element.

2. That Southwestern Bell Telephone Company shall make its Local Plus service available for resale by a company providing service to its customers through the use of the company's own switch.

3. This Report and Order shall become effective on May 11, 2001.

Lumpe, Ch., Drainer and Simmons, CC., concur;
Murray, C., dissents with attached dissenting opinion;
certify compliance with the provisions of Section 536.080,
RSMo 2000.

Gaw, C., not participating.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I respectfully dissent from this Report and Order because it goes beyond removal of the potentially anti-competitive aspects of SWBT's offering of Local Plus and may create a barrier to SWBT's continuing provision of this popular and beneficial service.

In TT-98-351, this Commission found, in approving SWBT's Local Plus tariff, that imputation of access charges was not necessary because the service would be available for purchase by CLECs and IXC's on both a resale and an unbundled network element basis. The Commission, at least impliedly, required that the service be available for resale by facility-based carriers as well as for resale by pure resellers. In that Report and Order, the Commission classified Local Plus as neither local nor long distance but as a hybrid.

The evidence is undisputed that pure resellers are allowed to purchase the service from SWBT at a wholesale discount and are entitled to the retail revenue from that service. SWBT retains control over its facilities and equipment and provides the specific service that is being purchased by the reseller. As such, SWBT remains responsible for paying all expenses incurred in the provisioning of the service, including terminating access charges and reciprocal compensation to third-party LECs. SWBT also remains entitled to receive all other revenues from its facilities, including originating and terminating access charges and reciprocal compensation.

Carriers that are not pure resellers are those that provide service on their own facilities or through use of unbundled network elements (UNEs) purchased from SWBT or through a combination of their own facilities and UNEs. These facility-based providers cannot technically resell a SWBT service such as Local Plus because the service is only provisioned by SWBT over its own network. Facility-based providers can offer an identical service and would ordinarily be entitled to receive all revenues from use of their own facilities and be responsible for paying all terminating compensation to other carriers.

In the hybrid scenario created by the Commission in TT-98-351, however, facility-based carriers are treated as if they were resellers. There the Commission allowed SWBT to price Local Plus without imputing access so long as SWBT made the service available for "resale" to all carriers. The Commission thereby created a scenario to which ordinary rules of resale cannot apply.

The purpose of imputation of access is to avoid anti-competitive, below-cost pricing. When access is imputed, all access charges that the carrier is able to avoid in the provision of the service are imputed and treated as a part of the cost of providing the service being priced. In the case of Local Plus, the Commission allowed SWBT to price the service without imputing the access it avoids. SWBT is able to avoid paying access charges for terminating Local Plus calls to its own customers. It does not avoid paying access for terminating Local Plus calls to third-party LECs. Therefore, the potential for anti-competitive pricing of Local Plus was cured by requiring SWBT to allow "resellers" to avoid the access that SWBT was able to avoid in its pricing of Local Plus. Since SWBT was never able to avoid paying

access for termination to third-party LECs, it follows that SWBT should not be required to pay access to third-party LECs when the service is being "resold" by carriers other than pure resellers.

Although it still requires adoption of the fiction that facility-based carriers can be resellers, the reasoning proposed here provides a more equitable solution than is being achieved by today's Report and Order. This reasoning would, like the majority decision, require SWBT to allow both pure resellers and facility-based carriers to purchase Local Plus at a wholesale discount. Those carriers that are pure resellers would continue to pay nothing more than the wholesale discount and SWBT would continue to be entitled to the same revenues from the service that is resold and provisioned over its network as it receives when provisioning the service to its own retail end users. SWBT would also continue to be responsible to pay all charges for terminating calls to third-party LECs, just as it is when provisioning the service to its own retail end users. SWBT would receive the wholesale discount price, rather than the retail price for the service. All other costs and revenues to SWBT would remain the same as when provisioning the service to its own end users, except that SWBT would avoid the cost of marketing to the end users. All parties agree that SWBT is currently making the service available for resale to pure resellers under these terms and conditions. Nothing would change for the situation with pure resellers under my analysis.

I depart from the reasoning of the majority, however, when it comes to the treatment of facility-based "resellers." I would require those carriers that are facility-based to pay both the wholesale discount and the charges for terminating calls to third-party LECs. Facility-based carriers would also receive the additional revenues from the service that SWBT would otherwise receive when provisioning the service over its own network to its own end users or to pure resellers because the facility-based carriers would be entitled to the revenue generated by provisioning service over their own networks. These carriers would avoid the cost of terminating to SWBT end users. Since the cost of terminating to SWBT end users is the most significant potential barrier to competitive provision of a Local Plus type service by facility-based carriers, this hybrid solution to a hybrid service would accomplish the goal of the Commission in TT-98-351, in a more reasonable manner than that of today's Report and Order.

For these reasons, I dissent.

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**In the Matter of St. Louis County Water Company for Authority
to File Tariffs Reflecting Increased Rates for Water Ser-
vice.***

*Case No. WR-2000-844
Decided May 3, 2001*

Water §8. A public utility engaged in the provision of water service to the general public in the state of Missouri is subject to the general jurisdiction of the Missouri Public Service Commission.

Water §20. The Commission's holding that the Company use the whole life method of determining depreciation rates is based on the record in this case, and on the circumstances in which the Company finds itself.

Rates §118. Because the Commission concluded that transactional costs associated with a merger/acquisition were non-recurring, such costs were inappropriate for inclusion in rate design.

The Commission traditionally, and properly, allows recovery of cost increases that are projected to occur after the end of the test year only if those costs are certain to occur and able to be determined with reasonable precision.

REPORT AND ORDER

Findings of Fact

St. Louis County Water Company d/b/a Missouri-American Water Company (the Company), on June 23, 2000, filed revised tariff sheets to implement a general rate increase. By order of the Commission, those tariff sheets have been suspended until May 20, 2001. The Company is a public utility engaged in the provision of water service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 2000.

The parties prefiled testimony pursuant to a Commission order, local public hearings were held in the St. Louis area on January 17, 2001, and on January 18, 2001, the parties filed a list of contested issues. An evidentiary hearing was held February 5-9, 2001. In the remainder of this section of this Report and Order, the Commission will make findings of fact on each disputed issue. The following section will contain the Commission's conclusions of law on each issue.

The Missouri Public Service Commission makes its findings of fact having considered all of the competent and substantial evidence upon the whole record. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted

*This order contains changes approved by the Commission in an order denying a rehearing issued on June 19, 2001. On June 26, 2001, this case was appealed to Cole County Circuit Court (01CV324557).

material was not dispositive of this decision. The numbering on each of the contested issues follows that used by the parties in their list of issues.¹

1.B.(1) What is the appropriate manner in which to treat net salvage?

Depreciation, in the context of this rate case, is the loss in service value primarily due to age and use of capital assets used to provide water service to the Company's customers. Depreciation accounting is the system that spreads the cost of these assets over their useful lives. In the whole life method of accounting, net salvage is accounted for in depreciation rates, and in straight line whole life depreciation, the original cost of an asset less net salvage is allocated in equal amounts to each year of an asset's service life. Net salvage is the difference between the value of retired plant and the cost of removing that plant. If it costs more to remove a piece of plant than that piece's value, net salvage is negative. Conversely, if at retirement a piece of plant has value in excess of the cost of removal, net salvage is positive.

The disagreement on this issue is whether the Commission should use the whole life method of calculating depreciation rates, or calculate depreciation rates without taking net salvage into account, and address net salvage in a different manner. The Company proposes the use of the whole life method, and Staff proposes to treat net salvage as an expense, separate from the calculation of depreciation rates.

Company's approach will collect from current customers a portion of the net salvage related to current plant in service. Staff's approach will collect from current customers net salvage related to plant that is being retired from service. Company's position is that a portion of the net salvage cost of a piece of plant should be recovered each year from the customers using that plant, in the same way that a portion of the original cost is recovered.

Company witness Stout's net salvage estimates, calculated as a ratio of cost of removal to original cost, average 33 percent for all depreciable plant in service on December 31, 1999. Staff witness Adam asserts that the Company's calculations of net salvage are as high as 200 or 300 percent. But the Company's actual calculations show that net salvage was higher than 100 percent for only two accounts (126 percent for Account 343.20 and 141 percent for Account 343.24). Although Mr. Stout's net salvage figures are estimates, as Staff points out, the Commission finds them to be reasonable estimates and finds Staff's assertions that they are 200 or 300 percent to be incorrect.

1.B.(2) Should the existing service lives of certain depreciable plant be adjusted?

The service life of a particular group of assets (sometimes grouped for the purposes of depreciation accounting as a plant account) is the time over which the

¹Because some issues were resolved after the numbering scheme was developed, the numbers are not consecutive.

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cost of those assets will be recovered. Both Staff and the Company propose changing the service lives of many plant accounts. Staff's proposed lives are attached to Staff witness Adam's direct testimony as a two-page list. In the body of Mr. Adam's testimony, he recommends that the Commission order the Company to use these lives. There was no evidence adduced that shows how any of these proposed lives were determined.

The Company's primary depreciation witness, Mr. Stout, determined his proposed service lives after analysis of available historical service life data, review of the Company's management's current plans and operating policies, and his general knowledge of service lives experienced and estimated in the water industry. He used Iowa type survivor curves to depict the estimated survivor curves for the plant account property groups. For major structures he used the life span technique, in which he estimated the date of final retirement for each building, and truncated the estimated survivor curves applied to each vintage at ages coinciding with this date.

The service lives proposed by the Company were based on historical data from the property records of the Company compiled through 1999. This data included plant additions, retirements, transfers and other activity. Mr. Stout used retirement data for the years 1939 to 1999 in the actuarial tables that are the primary statistical support for his service life estimates. Mr. Stout discussed with operating and management personnel the reasons for past retirements and the expected future causes of retirements, and incorporated information regarding future plans in his interpretation and extrapolation of the statistical analyses.

1.B.(3) Should the existing amortization of the depreciation reserve deficiency be adjusted?

A depreciation reserve deficiency exists if a calculated theoretical accrued depreciation reserve exceeds the book depreciation reserve. The size of the theoretical accrued depreciation reserve (and any deficiency or surplus) is a direct result of establishing net salvage, service lives, and the attendant depreciation rates. Any adjustment to the amortization of the depreciation reserve deficiency in this case depends on the Commission's resolution of the net-salvage and service-lives issues. If the Commission had adopted Staff's position on these issues, it would eliminate the amortization as Staff proposes. But since the Commission adopts the Company's position on them, it follows that the Company's proposed adjustment to the amortization is appropriate.

1.C.(1) Should the Company recover, in this rate case (return of and return on), transaction and/or transition costs related to the merger/acquisition between American Water Works (AWK) and National Enterprises (NEI)?

The Company proposes to recover costs associated with the acquisition of NEI (its former parent company) by AWK. The Company asserts that the acquisition will result in savings to customers of over \$3 million per year, and that the costs incurred

to bring about these savings should be recovered in rates. The Company's proposal is to recover the costs over a ten-year period and to include the unamortized balance in rate base.

Staff and the Office of the Public Counsel oppose recovery of these costs on a number of grounds. They consider some of the costs to be imprudent. They also believe that the Company will recover these costs through reduced expenses before the rates set in this case will go into effect, and that the costs are not recurring.

The costs associated with this issue are primarily related to the elimination of employees. As a result of the merger, the Company had the opportunity to reduce its workforce, but in doing so incurred separation and severance costs. These costs are unusual and will not be incurred again. The Commission finds that, for ratemaking purposes, these costs are non-recurring.

1.C.(2) Should the Company recover, in this rate case (return of and return on), transaction and/or transition costs related to the Company's use of the name "Missouri-American Water Company?"

The Company spent \$103,861 primarily to communicate to its customers that it is now using the name "Missouri-American Water Company." The Company argues that these expenditures are essential to providing safe and adequate service to its customers, and proposes to recover them over a ten-year period. Staff and the Office of the Public Counsel oppose recovery of these costs on a number of grounds. Public Counsel asserts that these costs are associated with a type of advertising categorized as institutional, and as such serve primarily to enhance a utility's image and are not recoverable. The Company counters that they are general advertisements and provide information that is useful in the provision of service. Although the Company alleges that the advertisements were necessary to allay customer confusion about the name it chose to use, there is no evidence in the record that any customers were confused by the Company's decision to change the name under which it operates. The Commission finds that these costs are a direct result of Company management's decision to operate under a new name. Furthermore, there is no evidence that these costs will be incurred in the future when the rates set in this case are in effect, and the Commission finds them to be non-recurring.

1.D. Should the Company be allowed to recover a portion of any "savings" which resulted from the AWK/NEI merger from Company's customers under its proposed "Shared Savings Plan"?

The Company asserts that, as a direct result of the merger, it will achieve savings of over \$3 million in the first year following the merger, and almost \$40 million in the ten years following the merger. It proposes to assign half of the demonstrated savings to the Company and the other half to ratepayers.

The Staff claims that the proposed savings plan is a thinly disguised attempt to recover the premium AWK paid to acquire NEI, and asks the Commission to reject it. Staff and Public Counsel both assert that the Company has already retained the

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benefit of sufficient savings to offset the prudently incurred costs of implementing the merger. They argue that this retention is of sufficient benefit to the Company to obviate the need for any additional relief.

The Commission resolves this issue on policy grounds as discussed in the Conclusions of Law. It need not, and does not, make specific findings as to whether Company's asserted savings have occurred or will occur. Neither will the Commission make a finding as to whether the proposed shared savings plan is tied to recovery of an acquisition premium.

1.E. Should the Company recover property taxes associated with plant that was placed in service during calendar year 2000?

The question presented here is whether rates should include an amount for property taxes that is equivalent to the last tax bill actually paid, or an estimated amount that is intended to be more representative of the amount expected to be paid in the future. Staff proposed to use the last actual tax payment as the most reliable indicator of future payments. The Company proposed to calculate the ratio of plant in service at December 31, 1999, to the property tax paid on that plant, and then apply that ratio to plant in service on December 31, 2000.

The Company's property tax expense has increased each year for the last ten years, but the actual tax rate for 2000 will not be known until sometime in the fall of 2001.

Staff used an expense lag of 182.5 days for property taxes in its calculation of cash working capital. Company witness Grubb testified that, if the Commission adopts Staff's position on property taxes, it should make an adjustment to cash working capital to eliminate any expense lag for property taxes. The Company reasons that:

. . . Staff is proposing to include in rates a level of property tax expense that was paid in December 2000. Rates in this case will go into effect in May 2001. Therefore, [cash working capital] should reflect the fact that the Company will pay the property taxes in December 2000 and not recover those taxes until starting in May 2000.

1.F. Should deferrals from infrastructure main replacement AAOs be recovered over a 20-year period as addressed by the Commission in WR-96-263, or should they be recovered over a 10-year period as advocated by Staff, or should they be eliminated as advocated by OPC, or should they be afforded some other treatment?

In 1994, in an order approving a stipulation in Case No. WR-94-166, the Commission recognized that the Company needed to begin an infrastructure

replacement program.² In 1994, the Company spent \$2.5 million on main replacements. The Company proposed to increase this expenditure over the next five years until it reached \$19.2 million in 1999. In Case No. WR-95-145, the Commission determined that Company's proposed infrastructure replacement expenditure for the five years ending in 1999, as described in the 1994 Plan, would constitute "a significant and unusual increase in County Water's business-as-usual construction expenditures, and is extraordinary in nature." The Commission adopted Staff's proposal to allow the Company to defer these expenses, and granted the Company accounting authority; this authorization is referred to as the first AAO.

In the Company's next rate case, Case No. WR-96-263, the Commission established a 20-year period for the amortization of the amounts deferred pursuant to the first AAO. The Commission authorized a second AAO for main replacement capital expenditures "[b]ecause the infrastructure replacement costs appear to be of such an extraordinary, infrequent and unusual nature when the rate of their increases is considered[.]" The Commission did not explicitly establish an amortization period for the second AAO.

The unamortized balance from the first AAO is over \$100,000, and from the second is \$207,000. The Company proposed to amortize and recover these balances over 20 years, with the unamortized portion being afforded rate base treatment. This is the method the Commission adopted for the first AAO in Case No. WR-96-263. Staff proposed that the balances should be amortized over ten years, with no rate base treatment for the unamortized balance. This is the method the Commission adopted in a 1998 Missouri Gas Energy rate case, Case No. GR-98-140.

1.G. Should amounts deferred and accumulated by the Company pursuant to the AAO requested by the Company, which is presently under consideration in Case No. WO-98-223, be afforded the treatment determined to be appropriate in (F) above?

The Company's 1997 rate case, Case No. WR-97-382, was settled by the unanimous agreement of the parties. One of the items that the parties agreed upon was that the issues concerning a third AAO should be docketed as a new case. That case was assigned Case No. WO-98-233. In the Report and Order issued February 13, 2001, in that case, the Commission decided not to grant the Company a third AAO. The Company, during the pendency of Case No. WO-98-233, deferred and accumulated amounts attributable to main replacements. At the time of the hearing in this case, the Company estimated that it had deferred approximately \$2.8 million.

The Company has not yet begun to implement an infrastructure replacement plan. It has consistently stated that it has never committed to begin such a plan, and consistently stated that it will not begin such a plan until it receives favorable

²The parties use the terms "infrastructure plan," "main replacement plan," and various combinations to refer to a systematic analysis of the Company's mains and a plan to increase the rate of their replacement. In the context of this Report and Order, when the Commission uses the term "infrastructure," it is referring to the portion of infrastructure consisting of transmission and distribution mains.

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regulatory treatment. There is evidence that the Company's spending on main replacements had increased from approximately \$2.5 million annually in 1995 to approximately \$7 million annually at the time of the hearing, but it is clear that this spending is not part of a systematic main replacement program.

2.A. How should the Commission treat the unamortized amounts from the two accounting authority orders (AAOs) related to infrastructure costs, which were previously addressed by the Commission?

This issue is simply another facet (the rate base treatment) of Issue 1.F., and the Commission's discussion of this issue is found under that heading.

2.B. Should amounts deferred and accumulated by the Company pursuant to the AAO requested by the Company, which is presently under consideration in Case No. WO-98-223, be afforded the treatment determined to be appropriate in (A) above?

This issue is simply another facet (the rate base treatment) of Issue 1.G., and the Commission's discussion of this issue is found under that heading.

3. What return on equity (ROE) should the Commission authorize?

The parties have resolved all issues related to the Company's cost of capital with the exception of the rate of return on equity.

Staff witness McKiddy used the continuous growth Discounted Cash Flow (DCF) model, a market-oriented approach, to determine AWK's cost of common equity. The Commission agrees with Ms. McKiddy's synopsis of the DCF model:

This model relies upon the fact that a company's common stock price is dependent upon the expected cash dividends and upon cash flows received through capital gains or losses that result from stock price changes. The rate which discounts the sum of the future expected cash flows to the current market price of the common stock is the calculated cost of equity.

Because the Company's stock is not publicly traded (it is held by its parent, AWK³), the DCF model cannot be used to directly analyze its cost of equity. AWK's stock is publicly traded, and Ms. McKiddy determined its cost of equity and applied it to the Company. She calculated a growth rate range of 6.75 percent to 7.75 percent using historic and projected data from a number of sources. She calculated a dividend yield using AWK's monthly high/low average stock price from June 1 through September 1, 2000, and ValueLine's estimate⁴ of AWK's average dividend

³Technically, the Company is a second tier subsidiary of AWK.

⁴The Value Line Investment Survey: Ratings and Reports, August 4, 2000.

for 1999 and 2000. This calculation resulted in an average dividend yield of 3.50 percent, and this is the figure Ms. McKiddy used in her DCF cost of equity estimate. Adding the dividend yield to the growth rate results in Staff's recommended cost of equity of 10.25 to 11.25 percent.

Ms. McKiddy also performed both a risk premium analysis and a capital asset pricing model (CAPM) analysis on AWK to check the reasonableness of her DCF analysis. Both of these analyses yielded results that confirmed the accuracy of the DCF calculation. In addition, she performed DCF, risk premium, and CAPM analyses on a group of five water utilities she considers comparable to AWK. All of these analyses, she concludes, support her recommended cost of equity of 10.25 to 11.25 percent. In conclusion, Ms. McKiddy notes that Value Line predicts that the water utility industry will earn 11.00 percent on equity in 2000 and 2001. The Commission finds that Ms. McKiddy's application of the DCF model is the most appropriate of the three in this case for determining the cost of equity.

Ms. McKiddy stated that, in her opinion, it is appropriate to apply AWK's cost of equity to the Company with no adjustments because they are in the same general line of business and have comparable capital structures.

Public Counsel witness Burdette also primarily used a DCF approach. He analyzed AWK and three other publicly traded water utilities. His analysis of AWK resulted in a cost of equity range of 8.34 percent to 13.75 percent, and his analysis of the other three companies resulted in a cost of equity range of 6.20 percent to 11.54 percent. The midpoint of Mr. Burdette's DCF cost of equity for AWK is 11.05 percent. Mr. Burdette's recommended cost of equity relies more on the calculations from his comparable group than from AWK, and the results of the initial calculations performed on his data were significantly adjusted based on his judgment.

Company witness Walker did not, as did Staff and Public Counsel, use the DCF as the primary analysis to be checked with other analyses. Rather he "used several models to help" him formulate a cost of equity recommendation. Notably, the DCF model yields the lowest return on equity percent of his three approaches. Mr. Walker also relied on analyses of electric utilities to estimate the Company's return on equity, despite significant differences between the water industry and the electric industry.

4.A. Should the Commission add projected costs associated with implementing the Company's infrastructure replacement plan to the test year expenses used to determine cost of service?

The Company proposes to increase rates by \$4.8 million (the average of the first three years' revenue requirements) to account for the increased spending it proposes to incur on main replacements. In essence, the Company's proposal is to include in rate base plant that has not yet been installed. The Company states, and the Commission finds, that it is experiencing an exponential increase in main breaks and resulting main repair costs because a portion of the Company's older mains are wearing out and need replacing. The Company also states, and the Commission also finds, that it needs to implement a main replacement program.

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The Company provided evidence that it “is investing every dime of its depreciation expense recoveries right back into plant.” In fact, the Company has, since 1990, invested more money in plant than it has recovered in annual depreciation expense.

The Company has in recent cases insisted that it will not begin to substantially increase spending on main replacements until it receives what it believes to be favorable regulatory treatment of its expected costs.

The Company's proposal in this case is more detailed than its past proposals. The Company proposes to increase infrastructure spending over the next three years, with an annual revenue requirement increase from this spending of approximately \$2 million in 2001, \$4.5 million in 2002, and \$7.9 million in 2003. The average over the three years is approximately \$4.8 million. The annual budget for infrastructure replacement for these years is \$9 million in 2001, \$15 million in 2002, and \$20 million in 2003.

The Company submitted the “Weston Report” which outlines a relatively comprehensive economic analysis of the planned main replacements. In Exhibit 80, admitted at the hearing over the objections of Staff and Public Counsel, the Company added more details to its proposal. The Company offered to commit to replacing certain mains within certain time periods and to make refunds to customers if those commitments were not met. Alternatively, the Company offered to use its best judgment in deciding whether the proposed main replacements should be modified and to allow that judgment to be subject to prudence reviews.

4.B. Should the Company be required to maintain a cost allocation manual and certain other information and reports concerning expenses charged to the Company by the American Water Works Service Company?

AWK, in addition to owning utilities that provide water service to customers, owns a service company that provides service to its water utilities. Public Counsel witness Dittmer proposes that the Company be required to prepare and maintain a cost allocation manual (CAM) that describes the methods American Waterworks Service Company (AWWSC) uses to accumulate or categorize costs and describes how these costs are allocated to AWK subsidiaries. Mr. Dittmer proposes that the CAM include the following information:

1. Listing of accounts including account numbers and descriptive titles, as well as a description of charges to be recorded within each account.
2. A copy of all contracts or service agreements between any and all AWWC affiliates and subsidiaries including the Service Company. If many of the agreements are identical in nature, one sample copy would suffice. Also, if the various contracts and agreements are voluminous, a description of their availability and locations should, at a minimum, be included within the CAM.
3. Listing of cost pools employed, a description of the physical location(s) wherein pool functions/activities take place, a description of the various types of activities and functions

taking place within each given cost pool, and an up to date table showing which subsidiaries benefit from each given pool as well as which subsidiaries are exempt from being allocated charges from any given cost pool (i.e., the table should also show a listing of subsidiaries which do not benefit from the pool).

4. For each subsidiary that is exempt from being allocated costs from a given pool, a definitive statement that such subsidiary does not benefit from functions being provided by the cost center in question should be included within the CAM. Furthermore, the CAM should include a brief explanation as to how each subsidiary which is exempt from a given pool's cost allocation accomplishes the functions which are provided by the pool.

5. A listing of each non AWWC owned company, municipality or entity included within the CAM which receives goods or services from the Service Company or any other AWWC owned subsidiary or affiliate as well as a description of the goods and services provided. Additionally, the CAM should include a description and detailed example, as applicable, of the method of determining how goods or services provided are priced or charged. Finally, a copy of any contract or service agreement with each such independent entity should be included in the CAM or in the alternative simply listed and referenced as to location and availability.

6. For any good or service that is charged to an operating company based upon a routinely applied allocation factor, such allocation scheme should be supported as to reasonableness, applicability and equity. In many instances, such explanations would be brief and nearly self evident as to reasonableness. For instance, a brief statement that customer billing costs are allocated based upon number of customers because such costs are understood to be driven primarily by customer counts would be all that would need to be documented in the CAM. Obviously, other allocation applications could be more detailed and complicated in nature, thus requiring greater explanation and support.

7. Tables detailing allocation factors derived from latest calendar year ending statistics which would include, but not necessarily be limited to:

- a. Direct payroll charged by each AWWC owned operating company;
- b. Revenues received by each AWWC owned operating company;
- c. Net investment in utility plant;
- d. Investment in net utility plant and investment in non-utility properties;

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e. Direct operation and maintenance expense charged to each AWWC owned operating company.

The benefits and necessity of requiring that such allocation factors be filed within the CAM are discussed within the following section of testimony.

8. A listing and sample copy of all routinely prepared reports as well as a narrative description of all data included on each such report.

9. Description of AWWC's or AWWSC's capabilities and availability to generate unique or customized reports from existing data bases.

10. A compendium of accounting guidelines currently in place.

The Company is allocated millions of dollars annually from AWWSC. Mr. Dittmer states that the CAM will allow the Commission to evaluate whether these allocated costs are appropriate. All of the data the CAM would encompass currently exists.

The Company asserts that Mr. Dittmer's proposal takes a different approach than does the Commission's rules on affiliated transactions. It also claims that it will be costly and time-consuming to prepare a CAM like the one Mr. Dittmer proposes. However, it did not produce any evidence to quantify either the time or cost involved.

Conclusions of Law

1.B.(1) What is the appropriate manner in which to treat net salvage?

While Staff criticizes Mr. Stout's estimates of net salvage costs in general, it does not note any specific problem with any specific estimate. Rather, the criticisms are based on the fact that the costs are estimates.

The Commission's decision on this issue is guided by policy. There is ample factual support to allow the Commission to choose either Staff's approach or the Company's. Under the circumstances faced by the Company, including its need for cash flow to address its infrastructure issues, the Commission concludes that using the whole life method and including estimated net salvage is in the public interest. The whole life method collects net salvage cost ratably over the life of plant by customers served by the plant. This approach is equitable based on the circumstances of this case.⁵

The Commission's conclusion about the use of the whole life method should not be taken as a final endorsement of it, nor as a condemnation of Staff's approach. Both have merit, and the Commission will use the one that fits the particular circumstances under investigation. The Commission explicitly distinguishes its holding on the net salvage issue here from its holding in Laclede Gas Company's

⁵The concept of intergenerational equity is that one "generation" of utility customers should pay the current costs of providing service to them. It is inequitable for customers to pay for the cost of providing service in the past or in the future.

recent rate case, Case No. GR-99-315. The Commission's holding that the Company's use of the whole life method of determining depreciation rates is based on the record in this case, and on the circumstances in which the Company finds itself. The whole life method is not appropriate for all types of property, for all utilities, and in all situations. In a situation in which a utility has a type of asset that is at or very near the end of its service life, that is not likely to be replaced, and for which the cost of removal is high and likely to move higher, another approach may be appropriate.

1.B.(2) Should the existing service lives of certain depreciable plant be adjusted?

No party proposed using the service lives and resulting depreciation rates currently authorized for the Company, and there is no evidence upon which the Commission could make a finding that the current service lives are still reasonable. The Commission thus must choose between Staff's proposed service lives and the Company's. Staff, in its reply brief, discusses at length the process by which it communicated to the Company the support for Mr. Adam's conclusions about proper service lives, and that the Company never challenged the sufficiency of that support. Staff warns the Commission not to make a decision that will require parties to file their entire workpapers as evidence. There is, however, a middle ground between putting in all of a witness' workpapers and putting in no evidence to support the witness' conclusions. In this case, there is no evidence in the record to support Staff witness Adam's conclusions about what the proper service lives should be. In the future, Staff should not automatically seek to have all witnesses' workpapers admitted into the record, but it must provide adequate support for the witnesses' conclusions. The Commission is bound to make its findings and conclusions based on the evidence of record, and the support for Mr. Adam's proposed service lives was never made a part of the record. The Commission concludes that the Company's proposed service lives should be adopted.

1.B.(3) Should the existing amortization of the depreciation reserve deficiency be adjusted?

A depreciation reserve deficiency exists if a calculated theoretical accrued depreciation reserve exceeds the book depreciation reserve. The size of the theoretical accrued depreciation reserve (and any deficiency or surplus) is a direct result of establishing net salvage, service lives, and the attendant depreciation rates. Any adjustment to the amortization of the depreciation reserve deficiency in this case depends on the Commission's resolution of the net-salvage and service-lives issues. If the Commission had adopted Staff's position on these issues, it would eliminate the amortization as Staff proposes. But since the Commission adopts the Company's position on them, it follows that the Company's proposed adjustment to the amortization is appropriate.

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1.C. Should the Company recover, in this rate case (return of and return on), transaction and/or transition costs related to the merger/acquisition between American Water Works (AWK) and National Enterprises (NEI)?

A test year allows the Commission to examine the relationship of actual costs, revenues, and rate base for a historical period, and to use that relationship to set rates for future periods. Unusual events that affect the relationship during the test year in a way that is unlikely to happen again are removed. The costs associated with the acquisition are one-time, non-recurring costs. Although they were expenses that occurred during the test year, similar expenses will not occur in the period in which rates set in this case are in effect. The Commission concludes that these costs are non-recurring and inappropriate for inclusion in rates, and therefore the question of what level of savings (if any) Company has achieved by paying these costs is immaterial.

1.D. Should the Company be allowed to recover a portion of any “savings” which resulted from the AWK/NEI merger from Company’s customers under its proposed “Shared Savings Plan”?

Regulation is intended to be a substitute for competition. In a competitive market, a company that achieves gains in efficiencies only gets to keep the benefit of those gains until its competitors implement similar efficiencies, and the company is forced to lower its prices to remain competitive. A regulated company does not get to keep the benefit of its efficiency gains indefinitely either. If the gains are large enough and not offset by increased costs elsewhere in its operations, a utility will get to keep the gains only until a complaint is brought and resolved. If the gains are offset by increased costs, the utility will only get to keep them until a rate increase case is filed and resolved. Gains in efficiency are “captured” in a rate case, and forward-looking rates are set taking the gains into account.

This last situation is the one in which the Company finds itself: it claims it has achieved gains in efficiency from the merger of NEI and AWK, but nonetheless has found it necessary to request an increase in rates. The Company asks to be allowed to share (i.e., keep 50 percent) of the savings it asserts it has achieved from the AWK/NEI merger. The Commission, in keeping with regulation’s role of simulating competition, will not approve the shared savings plan.

The Company argues that adopting a policy of allowing utilities to retain some of the savings they achieve will encourage them to pursue mergers and acquisitions. The Commission rejects this argument for two reasons. First, the utility industry, including water utilities, seems to be pursuing mergers and acquisitions quite willingly without this Commission approving shared savings plans. In fact, the Commission has never approved a savings sharing plan. Second, the Commission does not need to allow utilities to keep these benefits to create an incentive to achieve efficiencies (either through successful mergers and acquisitions or otherwise); the lag inherent in the regulatory process provides sufficient incentive.

1.E. Should the Company recover property taxes associated with plant that was placed in service during calendar year 2000?

The Commission traditionally, and properly, allows recovery of cost increases that are projected to occur after the end of the test year (including any adjustment periods) only if those costs are known and measurable. A cost increase is “known” if it is certain to occur, and it is “measurable” if the Commission is able to determine the amount of the increase with reasonable precision. The Company’s projected property tax increases are neither known nor measurable. While it is probable that the Company will experience an increase in property tax expense at the end of the year, it is by no means certain. Even more damaging to the Company’s proposal is the fact that its best estimate of the amount of any increase is based on an assumption that finds no support in the record. Company’s proposed property tax calculation assumes that the tax rates for 2000 will be the same as the tax rates for 1999. Because any increase in the Company’s property tax expense is not known and measurable, the Commission will not adopt the Company’s proposal. Staff’s proposal to use a known amount (the last amount actually paid), while probably not a perfectly accurate representation of the property taxes that will be paid in the future, at least avoids the speculation inherent in Company’s proposal.

The Commission also rejects the Company’s proposal to adjust the expense lag for property taxes to zero. Rates are set for the future based on an examination of the test year. Cash working capital is not a reconciliation of actual income received during the test year to actual expenses paid in the future, it is an estimate of the amount of time the Company is likely to have between when it receives cash and when it must pay expenses. In setting rates, the Commission uses a going-forward level of property taxes; it is not reconciling the payment of the actual taxes paid in December 2000 to when the cash was collected for that expense. The Commission adopts Staff’s position on property taxes as the best estimate of the level of property taxes during the period when rates set in this case will be in effect. The revenues collected through those rates, including an amount calculated to cover property taxes, will be collected throughout each calendar year, and property taxes will be paid at the end of each calendar year. The fact that the going-forward rates include an amount for property taxes that is identical to the amount paid in December 2000 is (from the standpoint of making adjustments to cash working capital) merely a coincidence. Staff’s calculation of 182.5 days’ lag for property taxes recognizes this collection period and this payment date. Mr. Grubbs’ proposed adjustment to cash working capital is inappropriate and is rejected.

1.F. Should deferrals from infrastructure main replacement AAOs be recovered over a 20-year period as addressed by the Commission in WR-96-263, or should they be recovered over a 10-year period as advocated by Staff, or should they be eliminated as advocated by OPC, or should they be afforded some other treatment?

In Case No GR-98-140, a Missouri Gas Energy (MGE) rate case, the Commission adopted a position advocated by Public Counsel that “guaranteeing the

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Company a ‘return of’ and ‘return on’ the . . . deferred balance [of an ongoing construction project] is not a fair allocation of regulatory lag. . . .” The Commission concluded that, for ratepayers and shareholders to share in the effect of regulatory lag, MGE should be allowed to earn a return of the deferred balance, but not a return on the deferred balance. This is the approach advocated by Staff in this case. The Company urges the Commission to continue to allow both a return of and a return on the deferred balance as it determined appropriate in Case No. WR-96-263.

Nothing binds the Commission to a particular ratemaking treatment of deferrals made pursuant to an AAO:

In the Public Counsel case [*State ex rel. Office of Public Counsel v. Public Service Com’n of Missouri*, 858 S.W.2d 806, Mo.App. W.D. 1993)], the court made it clear that AAOs are not the same as ratemaking decisions, and that AAOs create no expectation that deferral terms within them will be incorporated or followed in rate application proceedings.⁶

The Commission, based on the same reasoning it used in Case No. GR-98-140, will allow the Company to recover the deferred balances over ten years, but will not allow a return on the unamortized balance.

1.G. Should amounts deferred and accumulated by the Company pursuant to the AAO requested by the Company, which is presently under consideration in Case No. WO-98-223, be afforded the treatment determined to be appropriate in (F) above?

In the Report and Order in Case No. WO-98-233, the Commission held that “The record makes it abundantly clear that the Commission should not grant the requested third AAO for infrastructure replacement because the circumstances are recurring, not nonrecurring.” The Commission stated that the Company, to the extent it had deferred costs without Commission approval, could seek to recover them in this case. The costs that the Company deferred during the pendency of GO-98-233 are not extraordinary. They represent the level of main replacement expense that the Company has incurred in recent years and will continue to incur until it implements a systematic main replacement program. That program has not yet begun (or at least has not yet achieved a level that could in any sense be considered extraordinary). Because these costs are not extraordinary, they should not be afforded extraordinary treatment.

2.A. How should the Commission treat the unamortized amounts from the two accounting authority orders (AAOs) related to infrastructure costs, which were previously addressed by the Commission?

⁶ *Missouri Gas Energy v. Public Service Com’n, State of Mo.*, 978 S.W.2d 434, (Mo. App. W.D. 1998), at 438.

This issue is simply another facet (the rate base treatment) of Issue 1.F., and the Commission's discussion of this issue is found under that heading.

2.B. Should amounts deferred and accumulated by the Company pursuant to the AAO requested by the Company, which is presently under consideration in Case No. WO-98-223, be afforded the treatment determined to be appropriate in (A) above?

This issue is simply another facet (the rate base treatment) of Issue 1.G., and the Commission's discussion of this issue is found under that heading.

3. What return on equity (ROE) should the Commission authorize?

Staff recommends that the Commission establish a ROE between 10.25 percent to 11.25 percent, and prefers the midpoint of that range, 10.75 percent. The Company proposes a value of 12 percent and Public Counsel proposes 10 percent. The Commission has for many years judged the DCF method to be the most reliable for calculating a utility's cost of equity:

The Commission has consistently found Discounted Cash Flow (DCF) analyses to be appropriate for determining a rate of return on equity. . . . This is because it is relatively simple to apply and measures investor expectations for a specific company. . . . [T]he DCF analysis is considerably more systematic and allows this Commission to treat all utilities it regulates in a consistent manner.⁷

The Commission concludes that the evidence in this case shows the DCF model to be the best approach. The Commission also concludes that, of the applications of the DCF model in this case, Staff's DCF analysis of AWK is the most pertinent to the determination of the Company's cost of capital. Staff's approach is the best because it uses the most directly comparable substitute and because it is the "purest" application of the DCF model in the sense that it relies primarily on publicly reported data with little adjustment by the analyst. It is also the most appropriate because it uses the best proxy for the Company: the Company's parent. Staff simply applied the DCF method to the publicly-traded common stock of the Company's parent, AWK, and imputed that result to the Company. This is appropriate because the Company and AWK are in the same general line of business and have similar capital structures. Whenever possible, actual market data should be used to determine the cost of equity. Investors in AWK are investing in all of the companies that make up AWK, including the Company, and no risk adjustment is justified. The analyses performed by Public Counsel witness Burdette and Company witness Walker do not as accurately reflect the cost of equity

⁷ *In the Matter of the Joint Application of Missouri Cities Water Company*, 26 Mo. P.S.C. (N.S.) 1, 26-27 (1983).

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for the Company because their proxy groups do not as closely approximate the Company as does AWK. In addition, they both made significant adjustments to the results of their DCF analyses. Mr. Walker's use of electric utilities to determine the Company's ROE is a significant flaw.

After considering all of the evidence and the arguments of the parties, the Commission determines that the appropriate return on equity for the Company is 10.75 percent. 10.75 percent is close to the average return ValueLine predicts that the water utility industry will earn in 2000 and 2001. It is also very close to the midpoint of the range calculated by Public Counsel witness Burdette's DCF analysis of AWK (11.05 percent). It is near the midpoint between Public Counsel's recommended ROE of 10 percent and the Company's recommended ROE of 12 percent. Finally, it is the midpoint of Staff's range, and is the recommendation of Staff witness McKiddy.

4.A. Should the Commission add projected costs associated with implementing the Company's infrastructure replacement plan to the test year expenses used to determine cost of service?

The Commission will not get bogged down in the arguments over whether the Company has in the past made commitments to ramp up its replacement, or whether the Commission made an invitation for the Company to request inclusion in rate base of future plant or a suggestion that the Commission would approve such a request. The evidence in this case indicates that, while the situation may not yet be a crisis, now is the time for the Company to begin its infrastructure replacement program. The Company has recognized that such a program is necessary, and the Commission has found it to be so.

The Company's future plant proposal, however, runs afoul of several core regulatory principles and the Commission will not adopt it. It violates the used and useful standard, with the attendant harm to intergenerational equity. In other words, it would require current customers to pay for plant that is proposed to be built in the future, and possibly not used to provide service until after some of them are no longer customers. It violates the matching principle, that is, it builds into current rates an increase in one area of expenses, but does not take into account any possible savings in other areas or possible increased revenues. While the Company's proposal may eliminate the problem of refunds for money built into rates but not actually (or not prudently) spent, it does not eliminate the used and useful and matching problems. Because of these problems, the Commission cannot approve the inclusion of future plant in rates.

Even conceding the Company's argument that AAOs are a failed device, the fact remains that the Company received a significant increase in depreciation rates in its 1995 rate case and receives another increase in this case. In addition, the Company was allowed an amortization of the depreciation reserve deficiency in the 1995 case, and an additional amortization here. Just because the AAOs did not operate as Company hoped does not mean that it has not received favorable regulatory treatment that could have allowed it to begin to ramp up its infrastructure replacement program.

The Commission has authority to prescribe depreciation rates pursuant to Section 393.240.2, RSMo 2000. The Commission also has authority pursuant to that section to require a utility to place the moneys generated from depreciation rates into a separate fund and to prescribe the purposes for which they may be used. The Commission's favorable treatment of the Company's depreciation proposals will generate funds that can be used to begin to address infrastructure issues. The Company provided evidence that there is little need to restrict the use of funds received through depreciation rates since it "is investing every dime of its depreciation expense recoveries right back into plant." In fact, the Company has, since 1990, invested more money in plant than it has recovered in annual depreciation expense. Nonetheless, to ensure that these depreciation expense recoveries are used for main replacements, and to ensure that main replacements occur at the rate the Company believes is appropriate, the Commission will order the Company to set a certain level aside in a depreciation fund and to expend them only for main replacements. The Commission will require the Company to segregate depreciation expense recoveries in a depreciation fund sufficient to fund main replacements at the average level proposed by Company witness Salser in Schedule JES-1 to Exhibit 47.

4.B. Should the Company be required to maintain a cost allocation manual and certain other information and reports concerning expenses charged to the Company by the American Water Works Service Company?

The Commission agrees with Public Counsel that there should be information available for interested entities and the Commission to evaluate the costs the Company is allocated from AWWSC. The CAM described by Mr. Dittmer will be a very effective tool in this evaluation, and the Commission will order the Company to prepare and maintain such a CAM.

The Company points out that the Commission considered establishing affiliate transaction rules for the water industry, but decided against it. It argues that the Commission's decision not to implement these rules means that it should not require the Company to maintain a cost allocation manual. This argument has little merit. Simply because the Commission found no need to impose affiliate transaction rules on the water industry as a whole does not mean that there is no reason to be concerned about the Company's transactions with its affiliates. The Company's argument that the approach taken in Public Counsel's proposed CAM is different than the approach taken in the Commission's affiliate transaction rules is similarly misplaced. The focus of the CAM ordered here is much narrower than the rules; it is designed to provide information about the allocation of costs from a service-company affiliate. Finally, the Commission is unpersuaded by the Company's claims that the CAM will be costly and time-consuming to produce since the Company did not quantify either the time or the cost.

Pending Matters

On November 17, 2000, Public Counsel filed a motion for leave to late-file the direct testimony of its witness Dittmer. No party opposed that motion and it will be granted.

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On January 16, 2001, the Staff filed a motion for leave to late-file the proposed list of issues. No party opposed that motion and it will be granted.

On January 29, 2001, the parties filed a Stipulation and Agreement as to Rate Design. Although the agreement was not unanimous, no party opposed it and the Commission will treat it as unanimous pursuant to 4 CSR 240-115. The Commission finds the agreement to be reasonable and will approve it.

On April 5, 2001, Staff filed a motion for leave to late-file its brief. No party opposed that motion and it will be granted.

IT IS THEREFORE ORDERED:

1. That the tariff sheets filed by St. Louis County Water Company d/b/a Missouri-American Water Company on June 23, 2000, and assigned tariff number 200001199, are rejected.
2. That St. Louis County Water Company d/b/a Missouri-American Water Company is hereby authorized to file proposed tariff sheets in compliance with this Report and Order.
3. That St. Louis County Water Company d/b/a Missouri-American Water Company shall establish a depreciation fund as described herein.
4. That St. Louis County Water Company d/b/a Missouri-American Water Company shall establish depreciation rates in compliance with this Report and Order.
5. That the motion for leave to late file the direct testimony of its witness Dittmer filed by the Office of the Public Counsel on November 17, 2000, is granted.
6. That the motion for leave to late file the proposed list of issues filed by the Staff of the Commission on January 16, 2001, is granted.
7. That the Stipulation and Agreement as to Rate Design filed on January 29, 2001, is approved.
8. That the motion for leave to late file its reply brief filed by the Staff of the Commission on April 5, 2001, is granted.
9. That all motions not previously ruled upon by the Commission in this case are hereby denied, all objections not previously ruled upon are hereby overruled, and all evidence the admission of which was not specifically denied is admitted.
10. That this order shall become effective on May 13, 2001.

Lumpe, Ch., Simmons and Gaw, CC., concur;
 Drainer and Murray, CC., dissent, with attached
 dissenting opinion of Murray; certify compliance
 with the provisions of Section 536.080, RSMo 2000.

Deputy Chief Regulatory Law Judge Lewis Mills

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I respectfully dissent. I find that the evidence supports most of the company's revised revenue requirement deficiency position and I would make Staff's suggested adjustments only for severance packages and property taxes.

The majority has rejected the company's position on every issue except depreciation. On the depreciation issue, the majority has taken the unusual position of tying depreciation of current assets to main replacement scheduling and expenditures. I cannot, therefore, agree with the majority on its handling of even that issue. We should simply find that the appropriate calculation of whole life depreciation rates includes an accrual for future net salvage and reject the temptation to impose unrelated conditions.

The unamortized portions of deferrals from the infrastructure main replacement AAOs and from the amounts deferred and accumulated by the company in WO-98-223 should be included in rate base. Shortening the amortization period to ten years does not justify the withdrawal of rate base treatment. The action of the majority penalizes the company by forcing the shareholders to make a ten-year interest-free loan to the ratepayers.

A return on equity greater than that authorized by the majority is supported by the evidence, under any of the three methods of analysis presented. Today's decision does not allow an adequate return.

The majority rejects the company's request for future test year treatment of costs for the infrastructure replacement plan. The company presented evidence that it is willing for the Commission to order it to make specific investments each year and stated that it is willing to provide reports to Staff and OPC, submit to true-up analysis, prudence reviews and refunds with interest. The company seems to be asking the Commission to do exactly what the Commission stated in WR-95-145 that it would be receptive to doing. I think the proposed safeguards would allow us to include in rate base the expenditures associated with the infrastructure replacement program, without improperly shifting risk to the ratepayer. Furthermore, to grant the company's request would help avoid the added cost to ratepayers of more frequent rate cases which will undoubtedly result from today's decision.

The water industry is the most capital intensive of the industries this Commission regulates. It is also an increasing cost industry with well-documented needs to replace aging infrastructure and to comply with requirements of the Safe Drinking Water Act. The company has demonstrated a critical need for cash flow and has presented constructive suggestions to allow it to continue providing safe and adequate service while proceeding with a reasonable main-replacement program. That the majority has chosen to reject virtually all of the Company's proposals is troubling.

For these reasons, I dissent.

**In the Matter of Northeast Missouri Rural Telephone Company's
Rate Case in Compliance With the Commission's Orders in
Case Nos. TO-99-530 and TO-99-254.**

*Case No. TR-2001-344
Decided May 24, 2001*

Telecommunications §1. The Commission rejected the company's proposed tariff sheet that was designed to (1) eliminate the "interim, subject to refund" provision in the company's tariff, and (2) institute a general rate increase. However, the Commission determined that the company was not required to refund any of the revenue collected from the interim revenue-neutrality Carrier Common Line surcharge element and authorized the company to incorporate the interim revenue-neutrality Carrier Common Line surcharge into the company's rate structure. The Commission also found that the company did have a revenue deficiency of \$666,461. The order authorized the company to implement a rate design that raised access rates by \$420,498 and assigned \$61,375 to terminating cellular traffic. The Commission noted that the company may raise local rates as it finds appropriate in order to capture the balance of the revenue requirement, \$184,588.

Telecommunications §11. The Commission directed the company to adopt the depreciation rates developed by the Staff of the Commission for use by small telecommunications companies. Staff's recommended depreciation rates recover only the original capital cost of plant and exclude net salvage.

Depreciation §34. The Commission directed the company to adopt the depreciation rates developed by the Staff of the Commission for use by small telecommunications companies. Staff's recommended depreciation rates recover only the original capital cost of plant and exclude net salvage.

Rates §110. The Commission found that the company had a revenue deficiency of \$666,461, and authorized the company to implement a rate design that assigned \$61,375 to terminating cellular traffic and raised access rates by \$420,498, keeping parity between interLATA and intraLATA access rates and keeping the current originating Carrier Common Line rates versus terminating Carrier Common Line rates ratio. The Commission noted that the company may raise local rates as it finds appropriate in order to capture the balance of the revenue requirement, \$184,588.

APPEARANCES

Craig S. Johnson, Andereck, Evans, Milne, Peace & Johnson, 700 East Capitol Avenue, Post Office Box 1438, Jefferson City, Missouri 65102, for Northeast Missouri Rural Telephone Company.

Leo J. Bub, Senior Counsel, Southwestern Bell Telephone Company, One Bell Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

Paul S. DeFord, Lathrop & Gage, 2345 Grand Boulevard, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Vicky Ruth

REPORT AND ORDER

Procedural History

On December 4, 2000, Northeast Missouri Rural Telephone Company (Northeast) filed a revised access tariff sheet to eliminate the “interim, subject to refund” provision which currently exists in Northeast’s tariff, and also to institute a general rate increase request in accordance with the Commission’s decisions in Case Nos. TO-99-254 and TO-99-530. The proposed tariffs were assigned tariff number 200100612 and bore a requested effective date of January 4, 2001. Also on December 4, 2001, the company filed a motion for issuance of a protective order. The Commission granted the motion for a protective order on December 27, 2000.

On December 28, 2000, the Commission issued an Order Suspending Tariff, Providing Notice, and Setting Prehearing Conference. The Commission indicated that in order to allow sufficient time to study the effect of the proposed tariffs and to determine if they are just, reasonable and in the public interest, the Commission would suspend the proposed tariffs for a period of 150 days beyond the requested effective date, until June 3, 2001. Interested parties were directed to file an application to intervene no later than January 17, 2001. An early prehearing conference was scheduled for January 11, 2001. The parties were directed to file a proposed procedural schedule no later than January 16, 2001.

The Commission issued an Order Rescheduling Prehearing Conference on January 2, 2001, directing that the prehearing conference would instead be held on January 22, 2001. The parties were also instructed to file a proposed procedural schedule no later than January 22, 2001.

Southwestern Bell Telephone Company (SWBT) filed a timely Application to Intervene on January 4, 2001, which the Commission granted on January 16, 2001.

The Staff of the Commission (Staff) filed a Motion to Establish Procedural Schedule on January 22, 2001. The Commission approved the proposed procedural schedule, with a minor modification, by order issued January 26, 2001.

At the prehearing conference held on January 17, 2001, the presiding officer directed the parties to file a pleading indicating what test year period is proposed, and what, if any, pro forma adjustment period is suggested. The presiding officer also directed the parties to address the impact of the Opinion handed down on January 16, 2001, by the Missouri Court of Appeals, Western District, in Case No. WD 58324, *State of Missouri, ex rel. Alma Telephone Company, et al. vs. Public Service Commission of the State of Missouri*.

On January 31, 2001, Northeast filed its Compliance of Northeast Missouri Rural with Commission Direction at the January 17, 2001 Prehearing Conference. Northeast noted that the Company and Staff have agreed to use a calendar year

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2000 test year period. Northeast did not propose any updated test year period. Northeast noted that it is in the middle phases of a modernization or capital improvements project, but that due to winter weather and soil conditions, it is not anticipated that any more installations will occur in time to allow the auditing of the book and records in accordance with the procedural schedule in this case. Northeast indicated that the Opinion handed down January 16, 2001, is not yet final, and is subject to possible rehearing or transfer motions. Northeast stated that this case should go forward.

Staff filed its Suggestions Concerning Court of Appeals Opinion on February 5, 2001. Staff noted that the Opinion in the Court of Appeals case held that the doctrine of the law applied in Case No. TO-99-254 to preclude the Commission from requiring a telecommunications company that filed a revenue neutrality tariff upon the elimination of the Primary Toll Carrier Plan to then file a general rate case within eight to ten months. Staff pointed out that the Opinion is not yet final, and that on January 31, 2001, the Commission filed a Motion for Rehearing or, in the Alternative, Application for Transfer to the Missouri Supreme Court in Case No. WD 58324. Staff indicated that the current case should go forward.

On January 23, 2001, AT&T Communications of the Southwest, Inc. (AT&T), filed an Application to Intervene Out of Time. Northeast filed Suggestions in Opposition to AT&T's Application to Intervene Out of Time on January 29, 2001. On February 8, 2001, AT&T filed its Response to Northeast Missouri Rural Telephone Company's Opposition to AT&T's Application to Intervene Out of Time. By order issued February 23, 2001, the Commission granted AT&T's Application to Intervene Out of Time, finding that AT&T had shown good cause to permit its late intervention.

The Commission issued, on January 26, 2001, an Order Adopting Procedural Schedule, which provided for a hearing to be held April 11, 2001.

Staff filed its Test year and True Up Proposals on February 5, 2001. Staff noted that the Company and the Staff propose to use the calendar year 2000 as the test year in this case. Neither the Company nor Staff proposed an update period, and Staff has not identified any items that would warrant a true up audit and hearing.

On February 26, 2001, Northeast filed a Notice of Declassification, in which it declassified from "Proprietary" to "Public Status" certain specified schedules attached to the direct testimony of Gary Godfrey.

Staff filed direct testimony on February 28, 2001.

The Commission issued an Order Setting Test year on March 2, 2001. The order provided that the test year adopted for this case is the calendar year 2000.

On March 14, 2001, rebuttal testimony was filed on behalf of Northeast, AT&T, Public Counsel, and SWBT. On March 21, 2001, the Staff filed a Proposed List of Issues and Order of Witnesses. Staff, AT&T, and Northeast filed surrebuttal testimony on March 29, 2001. On April 3, 2001, Staff filed the Statement of Positions. On April 4, 2001, AT&T filed its Statement of Position. SWBT also filed its Statement of Position and Motion to Accept Filing Past the Commission's 12:00 p.m. Deadline on April 4, 2001. The Commission issued an Order Granting Motion to Accept Late Filing on April 5, 2001, accepting SWBT's Statement of Position filed out of time.

On April 11, 2001, an evidentiary hearing was held. All parties were present for the hearing. On April 25, 2001, Northeast filed its initial brief, as did Staff, SWBT, and AT&T. Reply Briefs were filed on May 1, 2001, by Staff, Northeast, and Public Counsel.

Late-filed Exhibits:

Following the hearing, the parties timely submitted Late filed Exhibit Nos. 17 through 20. The Commission had requested that the Company file a late filed exhibit to address what portion of its underearnings were related to the loss of the PTC Plan as compared to its addition of plant. In response, Northeast filed Exhibit 17, which is entitled Access Loss Due to PTC Plan Termination. Staff objected to Exhibit 17, arguing that Northeast did not include interLATA access minutes in its calculations even though the interim Carrier Common Line (CCL) surcharge applied to these minutes as well as to intraLATA access minutes. Staff also notes that Northeast did not include the CCL interim surcharge in its calculation of revenues earned following the termination of the PTC Plan even though no party has suggested that Northeast should refund any of those revenues. Staff calculated the percent of Northeast's revenue requirement related to the elimination of the PTC Plan and filed its document as Appendix A to its pleading.

On April 23, 2001, Northeast filed its Reply to Staff's Objection to Late-filed Exhibit 17. Northeast noted that it only included intraLATA access minutes in the PTC Plan losses portion of Late-filed Exhibit 17 because termination of the PTC Plan was only the termination of intraLATA toll service. Northeast stated that while there was a direct effect on intraLATA access from termination of the PTC Plan, there was no direct effect on interLATA toll or access that could be utilized for purposes of this calculation. Northeast also indicated that Staff's objection does not rise to the level of admissibility, but rather is one of the weight to be assigned to the exhibit. The Commission hereby overrules Staff's objection, but will allow Staff's alternative exhibit to be admitted as well. The Commission will give each exhibit the weight to which it is due.

Staff submitted Late filed Exhibit 18, which is a Chart Showing the Basic Local Service Rates. There were no objections to this exhibit, and the Commission will admit it.

Northeast filed the RUS Allowable Capital Credits Distribution/ Guidelines, which is marked as Late-filed Exhibit 19. There were no objections to this exhibit, and it is admitted into the record.

Northeast also submitted Late-filed Exhibit 20, entitled Number of Lifeline Subscribers. No party filed an objection to this exhibit, and it is hereby admitted into the record.

Discussion

Pursuant to Commission procedure in contested cases, and as directed by the procedural schedule, the parties jointly submitted the following list of issues for resolution by the Commission:

- 1) Should Northeast refund any of the revenue collected from the interim revenue-neutrality CCL (Carrier Common Line) surcharge element?
- 2) Should the company's interim revenue-neutrality CCL surcharge element be incorporated into the Company's rate structure?

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- 3) What, if any, changes should be made to the company's currently ordered depreciation rates?
- 4) What, if any, additional revenue requirement is appropriate for the company based upon the 2000 test year?
- 5) What amount of revenues should be assigned to terminating cellular (CTUSR) traffic?
- 6) What rate design should be utilized to produce the company's revenue requirement?

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Northeast is a telephone cooperative as defined by Section 386.020(54), which states that a telephone cooperative is one in which at least 90 percent of those persons and corporations subscribing to receive local telecommunications service from the corporation own at least 90 percent of the corporation's outstanding and issued capital stock and in which no subscriber owns more than two shares of the corporation's outstanding and issued capital stock. Northeast's headquarters are in Green City, Missouri.

Section 392.230, RSMo, provides that a small telephone company is a local exchange telecommunications company which serves no more than 25,000 subscriber access lines in the state of Missouri. Northeast serves approximately 4,500 customers and is a small telephone company.

1. Should Northeast refund any of the revenue collected from the interim revenue-neutrality Carrier Common Line (CCL) surcharge element?

No party has suggested that Northeast should be ordered to refund any of the revenues collected under the interim, subject to refund, CCL rates. The Commission notes that with the interim CCL rates in place, the company still has an estimated revenue deficiency of \$666,461.¹ Therefore, the Commission finds that Northeast should not be ordered to refund any of the revenues collected under the interim, subject to refund, CCL rates.

2. Should the company's interim revenue-neutrality CCL surcharge element be incorporated into the company's rate structure?

No party has suggested that the interim, subject to refund, provision should not be removed from Northeast's CCL rate sheet. As noted above, even with the interim

¹The amount of revenue deficiency is discussed further under Issue 4.

CCL rates in place, the company is experiencing a revenue deficiency. The Commission finds that the interim, subject to refund, provision should be removed from Northeast's CCL rate sheet, as agreed to by all the parties.

3. What, if any, changes should be made to the company's currently ordered depreciation rates?

Staff argues that the Commission should order the Company to adopt the depreciation rates developed by Staff for use by small telecommunications companies. Section 392.280.1, RSMo 2000, empowers the Commission to fix depreciation rates for a telecommunications company's property. Staff's recommended depreciation rates recover only the original capital cost of plant and exclude net salvage. Section 392.280.1, RSMo 2000, also authorizes a telecommunications company to request the Commission to authorize minimum depreciation rates in lieu of fixed rates and to record depreciation expenses on the basis of depreciation rates in excess of such minimum rates. Staff's proposed depreciation rates divide some accounts into subsidiary accounts. Staff also proposed that certain costs (Account 2351, Public Telephones, and Account 2431, Aerial Wire) should not accrue any additional depreciation reserve at this time. Staff states that its recommendation in this case does not preclude Northeast from subsequently requesting that the Commission set the Staff's proposed depreciation rates as minimum rates, but with Northeast authorized to record depreciation expense based on higher depreciation rates.

Northeast argues that no changes should be made to the currently ordered depreciation rates. Northeast points out that the company has Telephone Authority Order No. 1001, dated January 31, 1996, which sets authorized minimum rates, allows higher booked rates, specifies that nothing in the order is a finding for ratemaking purposes, and requires Northeast to keep its books so that depreciation expenses could be calculated using either rates. Noting that it has followed these requirements, Northeast contends that the accounting authority order should continue to be followed as it provides the Company and the Commission with the appropriate flexibility.

AT&T and SWBT did not take a position on this issue.

The Commission finds Staff's arguments to be persuasive. Northeast is a small telecommunications company, and the Commission determines it is appropriate for Northeast to use the schedule of depreciation rates developed by Staff for use by small telecommunications companies. The Commission notes that this determination does not preclude Northeast from subsequently requesting that the Commission set the Staff's proposed depreciation rates as minimum rates but with Northeast authorized to record depreciation expense based on higher depreciation rates.

4. What, if any, additional revenue requirement is appropriate for the company based upon the 2000 test year?

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Based on its audit, Staff calculated that Northeast has a revenue deficiency of \$666,461. Northeast has accepted the Staff's figure.

Public Counsel believes that the appropriate additional revenue requirement is \$605,086 after an adjustment for cellular traffic termination (i.e., \$666,461 - \$61,375 = \$605,086). This assignment of revenues to the termination of wireless traffic is discussed under Issue 5.

AT&T and SWBT did not take a position on this issue.

The Commission notes that this issue is not contested as the parties agree that the appropriate additional revenue requirement is \$666,461. Public Counsel's position regarding the adjustment for cellular traffic termination is discussed below. The Commission finds that the additional revenue requirement for the company, based on a 2000 test year, is \$666,461.

5. What amount of revenues should be assigned to terminating cellular traffic?

Staff's audit revealed that Northeast has been able to identify an annualized level of 935,592 minutes of wireless calls that are terminated on Northeast's facilities for which no access charges are paid. Public Counsel calculated that \$61,375 may be generated from wireless termination based on a computed cellular rate of \$.0656 from the Commission's Order in Case No. TT-2001-139.² Public Counsel urged the Commission to accept a tariff filing consistent with the methodology approved in TT-2001-139 for implementing rates for cellular termination. Northeast and Staff accept Public Counsel's proposal that \$61,375 be assigned to terminating cellular traffic.

Although AT&T does not dispute this calculation, AT&T contends that it is inappropriate to assign any specific amount of revenue to be recovered from the termination of wireless traffic as the law provides that the Commission only has jurisdiction to establish exchange access rates for telephone cooperatives. Northeast counters that it is appropriate to recognize that some level of revenue is and should be attributable to this traffic. Northeast notes that if no revenue were recognized, the revenue requirement to be satisfied from local and access rates would be \$61,375 higher than currently agreed. Northeast contends that this could place pressure for even higher access rates, which AT&T opposes. Northeast indicates that it does not believe that approval of the revenue requirement, attributing \$61,375 to terminating wireless traffic, would be tantamount to approval of the rate. Northeast states that should the company file a tariff with such a rate, it would be subject to the normal tariff procedures utilized by the Commission for the other small LECs for whom such tariffs were recently approved.

SWBT did not take a position on this issue.

The Commission finds that the proposal that \$61,375 be assigned to terminating cellular traffic, which was agreed to by Staff, Northeast, and Public Counsel, should be adopted. It is appropriate to recognize that some level of revenue is and

²In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce its Wireless Terminating Service, Report and Order, February 8, 2001.

should be attributable to this traffic. However, attributing \$61,375 to terminating wireless traffic is not tantamount to approval of the rate.

6. What rate design should be utilized to produce the company's revenue requirement?

This is the major contested issue for the Commission's determination. The Commission must decide how much of the additional revenue requirement should be assigned to local rates and how much should be assigned to exchange access rates.

a. Northeast's Position

Northeast emphasizes that it is a small, rural telephone company serving about 4,500 customers in 11 exchanges. Northeast is a cooperative operating in north central and northeast Missouri. Members pay a one time charge of \$10.00 for membership in the cooperative.

Northeast points out that under Section 392.220, RSMo, the Commission has jurisdiction over the switched access rates charged by a cooperative, but not over the local service rates charged by a cooperative. The CCL rates are rate elements of switched access service. Inter-exchange carriers pay switched access rates for the use of the local company's facilities in originating and terminating long—distance calls. Northeast originally proposed to collect the entire revenue deficiency through increased CCL rates. However, Northeast revised its original proposal, and now suggests the following rate design: Increase local revenues (includes local rates and rates for custom calling services and directory assistance) by \$144,500, increase access revenues by \$460,338, and impute \$61,375 for the terminating wireless charge ($\$144,500 + \$460,338 + \$61,375 = \$666,213$).³

Northeast proposes to raise residential local rates from \$5.00/month to \$7.50/month, and raise business local rates from \$7.50/month to \$10.00/month. The company proposes to increase the charge for custom calling services, such as Call Waiting, 3-Way Calling, and Speed Dialing, from \$.75 to \$1.00 per month. The company also agrees to implement a new charge for directory assistance of \$.35 per call. The increased charges for custom calling services and directory assistance would produce approximately \$17,139 in additional revenues. Raising the local rates and raising the rates for custom calling services and directory assistance would result in approximately \$144,500 in increased revenues.

In order to accomplish the increase in revenues from switched access rates, Northeast proposes to increase its originating CCL rate from \$.05255 to \$.060104, and its terminating CCL rates from \$.09428 to \$.107832, making a composite switched access rate of \$.259136 [$\$.060104$ (originating CCL) + $\$.107832$ (terminating CCL) + $\$.0912$ (transport)].

Northeast emphasizes that it is a high-cost rural company and that it is normal and to be expected that its high costs will be reflected in access rates that are much higher than a company such as SWBT. Northeast contends that its rate design is a reasonable allocation of the additional revenue requirement between local rates

³Due to rounding, the total does not equal the agreed-upon revenue requirement.

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and access rates. However, the company indicates that Public Counsel's rate design is also "within the realm of reason." On the other hand, Northeast contends that the proposal of Staff and SWBT to place 70 percent of the increased revenue requirement on local ratepayers is unreasonably excessive, and that AT&T's proposal to place 100 percent on local rates is completely unreasonable.

b. Staff's Position

Staff notes that Northeast is a telephone cooperative, and that subsections 2 and 5 of Section 392.200, RSMo 2000, limit the Commission's jurisdiction over a telephone cooperative's rates for providing telecommunications service within an exchange or local calling scope to only rates for exchange access service. Staff argues that the Commission should expect Northeast's local exchange rates to be \$13.00 per month for residential customers and \$19.50 per month for business customers. Staff notes that these rates are comparable to the higher rates charged by other small companies. Staff's imputed local exchange rates would produce \$426,624 in additional revenues. The Company's proposal for custom calling services and directory assistance would produce \$17,139 in additional revenues. Public Counsel's proposal for a terminating wireless charge would produce \$61,375 in additional revenue. The total of these additional revenues is \$505,138 (\$426,624 + \$17,139 + \$61,375), which leaves a revenue deficiency of \$161,323 (\$666,461 - \$505,138), to be applied to increases in Northeast's switched access rates.

In order to achieve the \$161,323 in increased switched access revenue, Staff recommends increasing Northeast's originating and terminating CCL rates by 14 percent each to \$.060104 and \$.107832 (from .05255 and .09428) respectively, to recover the remaining revenue deficiency. Staff argues that its rate design is reasonable, whereas Northeast's proposal, which moves the company from having the third highest access rates in the state of Missouri to having the highest access rates of the 42 ILECs, places too much of a burden on access rates. Staff states that its proposal would move the company's composite switched access rates from third highest to second highest of the 42 ILECs. Staff contends that this composite rate would still be within the range of rates previously determined by the Commission to be reasonable.

c. Office of the Public Counsel's Position

Public Counsel emphasizes that the Commission's jurisdiction over cooperatives is limited to the area of rates charged for exchange access service. Section 392.220, RSMo.

Public Counsel advocates a middle ground between the company's position and Staff's position. Public Counsel supports maintaining the current proportion of originating to terminating access. Public Counsel's rate design would recover approximately 63 percent (\$420,498) of the increase from access rates; nine percent (\$61,375) would be generated from cellular termination; and the company would be required to seek recovery of the remaining 28 percent (\$184,589) from its other services.

In support of its rate design, Public Counsel notes that its plan would properly leave to the company the job of setting rates other than exchange access, while still

allowing the Commission to fulfill its responsibility to consider all relevant factors in establishing access rates. Public Counsel's rate design also permits the Commission to avoid burdening landline access customers with costs more fairly recoverable from cellular companies.

d. AT&T's Position

AT&T argues that Northeast's current access rates are excessive and that the Commission should refuse to further increase those rates. AT&T notes that Northeast has some of the highest switched access rates in the state, while its charges for other services, including local exchange service, are among the lowest in the state. AT&T argues that because the Commission's jurisdiction is limited to establishing the level of Northeast's switched access rates, the Commission should begin its analysis by determining the maximum just and reasonable charges for those services. AT&T indicates that once that determination is made, Northeast is free to adjust the rates charged for all other services to its members (large customers) in order to obtain a suitable amount of revenue.

AT&T believes that it is important that the Commission decrease rather than increase these originating access rate subsidies in order to lessen the incentive for toll providers to exit markets such as Northeast's market. AT&T reiterates its encouragement that Northeast seek to mitigate its current revenue shortfalls by, at least temporarily, suspending distributions to co-op members and seek additional relief from the Missouri Universal Service Fund.

e. SWBT's Position

SWBT supports the Staff's proposal under which Northeast's originating and terminating switched access CCL charges would be increased to recover an additional \$161,313 in revenue. SWBT states that, like Staff, it believes that it would be reasonable for Northeast to increase (or establish) rates for services outside the Commission's jurisdiction to recover any remaining revenue requirement. SWBT argues that Northeast's current rate design has already shifted a disproportionate amount of its revenue requirement to its access customers and that the Company's proposed rate designs are improperly skewed to favor its local ratepayer/co-op members.

f. Commission Decision

The Commission finds that Public Counsel's proposal to allow the company to raise access rates by \$420,498 is appropriate. This rate design allows the Commission to consider all relevant factors in establishing access rates and it fairly balances the competing interests. The proposal maintains the present ratio or balance of company revenues derived from local and access services and it stays within the statutory limits of the Commission's authority under Section 392.220, RSMo. Although Public Counsel's proposal incorporates the company's agreement to increase local rates and some vertical services and directory assistance, the Commission does not have the authority to order the company to raise local rates.

The Commission also notes that Public Counsel's proposal provides some "breathing room" for an additive (perhaps up to \$4.00) for an expanded local calling

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scope to areas of the community of interest. The Commission encourages the company to consider implementing an expanded calling scope in the near future. The Commission notes that even if the company raises residential local rates to \$8.00, it can offer an expanded calling scope for around \$4.00, and yet still be under the \$13.00 local residential rate that some other small companies are charging.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Northeast is a telephone cooperative as defined by Section 386.020(54), which states that a telephone cooperative is one in which at least 90 percent of those persons and corporations subscribing to receive local telecommunications service from the corporation own at least 90 percent of the corporation's outstanding and issued capital stock and in which no subscriber owns more than two shares of the corporation's outstanding and issued capital stock. The Missouri Public Service Commission has jurisdiction over the exchange access service of a cooperative, but not over the services, activities, and rates of rural telephone cooperatives, as specified in Section 386.250(2) and 392.220, subsections 2 and 5. However, because the proposed tariff and rates herein at issue are in the nature of exchange access, the Commission concludes that it does have jurisdiction over the proposed tariffs and rates filed by Northeast.

Section 392.280.1, RSMo, empowers the Commission to fix depreciation rates for a telecommunications company's property. Northeast is a small telecommunications company providing service to approximately 4,000 customers. Staff has developed a schedule of depreciation rates to be used by small telecommunications companies. The Commission concludes that, for policy reasons, it is in the public interest for Northeast to be directed to adopt Staff's depreciation rates for small telecommunications companies.

The General Assembly created the Public Service Commission in 1913, and delegated to it the police power to establish utility rates, subject to judicial review of the question of reasonableness. *Lightfoot v. City of Springfield*, 161 Mo. 659, 236 S.W.2d 348 (1951). The Commission's purpose is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity. *May Dep't Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (1937).

To that end, the Commission is authorized to ensure that the facilities provided by telephone corporations are adequate and that their rates are just and reasonable. Section 392.200.1. A "just and reasonable" rate is one that is just and reasonable to both the utility and its customers, *State ex rel. Valley Sewage Co. v. Public Service Commission*, 515 S.W.2d 845 (Mo. App., K.C.D. 1974); it is no more than is necessary to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested." *State ex rel. Washington University, et al. v. Public Service Commission, et al.*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (banc 1925).

The Commission has found that Northeast has a revenue requirement of \$666,461. In order to achieve part of that revenue requirement, the Commission

finds that it is appropriate to allow the company to raise its access rates to level proposed by Public Counsel. Northeast has failed to provide sufficient evidence that access rates at any higher level are just and reasonable. Allowing Northeast to raise its access rates to this level will result in increased revenues of \$420,498. The Commission also determines that \$61,375 should be imputed for the terminating wireless charge. Northeast may raise local rates as it finds appropriate in order to capture the balance of the revenue requirement, \$184,588. This rate design fairly balances the interests of the telephone cooperative with the interests of the toll providers.

IT IS THEREFORE ORDERED:

1. That the proposed tariff sheet, tariff file number 200100612, filed by Northeast Missouri Rural Telephone Company on December 4, 2000, is rejected.
2. That Northeast Missouri Rural Telephone Company shall not be required to refund any of the revenue collected from the interim revenue neutrality Carrier Common Line surcharge element.
3. That Northeast Missouri Rural Telephone Company is authorized to incorporate the interim revenue neutrality Carrier Common Line surcharge element into the company's rate structure.
4. That Northeast Missouri Rural Telephone Company shall adopt the depreciation rates developed by Staff for use by small telecommunications companies. The effective date of the new depreciation rates shall be the effective date of this order.
5. That Northeast Missouri Rural Telephone Company has a revenue deficiency of \$666,461.
6. That revenues of \$61,375 shall be assigned to terminating cellular traffic.
7. That Northeast Missouri Rural Telephone Company may implement a rate design which raises access rates by \$420,498, keeping parity between interLATA and intraLATA access rates and keeping the current originating Carrier Common Line rates versus terminating Carrier Common Line rates ratio.
8. That Northeast Missouri Rural Telephone Company is directed to file new tariff sheets consistent with this order no later than June 25, 2001.
9. That any other motions not previously determined herein are denied.
10. That this Report and Order shall become effective on June 3, 2001.
11. That this case may be closed on June 4, 2001.

Lumpe, Ch., Simmons and Gaw, CC., concur;
Murray, C., dissents, with dissenting opinion attached;
certify compliance with the provisions
of Section 536.080, RSMo 2000.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I would reject the tariff. I disagree with the majority's decision to approve an increase in switched access rates for Northeast Missouri Rural Telephone

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Company (Northeast). Northeast's switched access rates are already among the highest in the state; excessively subsidizing its local rates, which are among the lowest in the state. Today's decision increases this distorted subsidy flow.

Although my position to reject the tariff would not require findings on the other issues, I further disagree with the majority on the issues of depreciation and assignment of revenues to terminating cellular traffic. I agree with Northeast that no changes should be made to the currently ordered depreciation rates. I agree with AT&T that it is inappropriate for the Commission to encourage a tariff filing for the termination of wireless traffic.

For these reasons, I dissent.

**In the Matter of Union Electric Company d/b/a AmerenUE for
Authority to Extend its Gas Supply Incentive Plan.**

Case No. GT-2001-635

Decided May 31, 2001

Gas §18. Rates §108. The Commission issued its order approving a stipulation which agreed that the proposed tariff sheet extending AmerenUE's Gas Supply Incentive Plan should be approved and AmerenUE filed a compliance tariff the same day, which was approved.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

This order approves the stipulation filed by two of the parties.

Brief Procedural History

On March 28, 2001, Union Electric Company, d/b/a AmerenUE, submitted to the Missouri Public Service Commission a proposed tariff sheet, effective April 27, 2001, to extend its Gas Supply Incentive Plan (GSIP) an additional year. AmerenUE extended the effective date on April 25, 2001, to May 1, 2001, and on April 30, 2001, to June 1, 2001.

The Stipulation and Agreement

AmerenUE and Staff filed a proposed stipulation and agreement on May 16, 2001.

Briefly restated, the terms are:

- AmerenUE will extend its GSIP from June 1, 2001, to May 31, 2002, under the general terms in AmerenUE's current tariff. AmerenUE waives its retention of any of the GSIP related revenues from April 1, 2001, to May 31, 2001. AmerenUE's share of any GSIP related revenues from June 1, 2001, to May 31, 2002, will be capped at a total of \$400,000. AmerenUE agrees to meet with the Staff by July 16, 2001, to develop a report describing AmerenUE's gas supply plan for the 2001-2002

heating season. The report will be submitted to the Staff no later than August 3, 2001.

- If the Commission approves the stipulation, AmerenUE will file a compliance tariff similar to the specimen tariff sheet attached to the stipulation as Exhibit A.

- The stipulation resolves only AmerenUE's proposed extension of its GSIP. None of the signers acquiesce in any ratemaking or procedural principle, including any cost determination or cost allocation method, depreciation or revenue related method, or any service or payment standard; and none of the signers will be bound by the stipulation in any other proceeding. AmerenUE will not extend the GSIP in its current form beyond May 31, 2002. None of the parties is prohibited from proposing a revised GSIP after May 31, 2002.

- The stipulation resulted from extensive negotiations between the signers and the terms are interdependent. If the Commission does not approve the stipulation, or approves the stipulation with modifications that a party objects to, then the stipulation is void.

- If the Commission approves the stipulation, the parties waive: their rights under Section 536.080.1, RSMo 2000,¹ to present testimony, to cross examine witnesses, and to present oral argument and written briefs; their rights to the reading of the transcript by the Commission under Section 536.080.2; and their rights to judicial review under Section 386.510.

- The Staff will submit a memorandum explaining why it signed the stipulation. Each party will be served with the memorandum and may submit a response. All memoranda: will be privileged in the same manner as are settlement discussions under the Commission's rules; will be maintained on a confidential basis by all parties; and will not become a part of the record or bind the party submitting the memorandum in any future proceeding. The contents of any memorandum provided by a party are its own and are not adopted by the other signers.

- The Staff may provide at an agenda meeting whatever oral explanation the Commission requests, provided that the Staff will promptly provide the other parties with advance notice of when the Staff will respond to the Commission's request for the explanation once the explanation is requested from Staff. Staff's oral explanation will be subject to public disclosure, except to the extent it refers to matters that are privileged or protected from disclosure.

¹References to Sections of the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of the year 2000.

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- The signers agree that the Office of the Public Counsel has stated that it neither supports nor opposes the stipulation and did not sign.

The parties thus requested an order approving the stipulation.

Expedited Pleadings

Because of the proposed effective date requested by the parties, the Commission required the Staff to file its memorandum and any party wishing to file a responsive memorandum to do so in an expedited manner. Thus, on May 23, 2001, the Commission issued its order requiring the Staff to file its memorandum that day, no later than 3:00 p.m. The Commission also required any other party wishing to respond to Staff's memorandum to file a response by May 24, 2001, no later than 3:00 p.m.

The Staff's Memorandum

On May 23, 2001, the Staff filed its memorandum in support of the stipulation. Staff's memorandum pointed out the following:

The stipulation allows AmerenUE to extend its GSIP from June 1, 2001, to May 31, 2002. However, this stipulation also makes modifications to the GSIP and places several additional requirements on AmerenUE. Staff maintains that these modifications result in significant improvements in the GSIP. These modifications are:

- The total of GSIP related revenue earned by AmerenUE will be capped at \$400,000 over the one year extension period. During the first three years of the GSIP, AmerenUE's share of GSIP related revenues has increased dramatically. Although customers also received proportional increases in shared savings, this cap limits the amount of revenues that can be earned by AmerenUE while giving ratepayers the opportunity to receive a greater amount of savings.
- AmerenUE agrees to waive its retention of any of the GSIP related revenues that may have been earned April 1, 2001, to May 31, 2001. Staff maintains that since the previous GSIP expired on March 31, 2001, AmerenUE would not be entitled to any GSIP related revenues during that two month period. Without this agreement, however, AmerenUE might have accrued the GSIP revenue related savings through the Purchased Gas Adjustment/Actual Cost Adjustment (PGA and ACA) process, with ensuing litigation. Staff maintains that giving any savings that occurred between April 1, 2001, to May 31, 2001, to customers has real value.
- AmerenUE agrees to meet with Staff by July 16, 2001, to further develop the report describing AmerenUE's gas supply plan for the 2001 2002 heating season. This report will be submitted to the Staff no later than August 3, 2001. Staff maintains that

this requirement has significant value to ratepayers. It requires AmerenUE to submit a report on AmerenUE's gas supply plan on a current basis. Although some of this information would be provided to Staff in the ACA process, this information would have been provided on an after the fact basis. The August 3, 2001, submittal of the gas supply plan will give Staff insight into AmerenUE's plan while that plan is still being carried out.

- In addition, the requirement of a July 16, 2001, meeting will provide both Staff and AmerenUE with the opportunity to have frank discussions regarding the gas supply planning process. While this may seem like a minor point, Staff notes that most discussions between Staff and AmerenUE regarding AmerenUE's gas supply plan are held as part of the PGA/ACA review process that often limits the free exchange of ideas. In fact, Staff maintains that the discussions that led to the stipulation have already resulted in a frank exchange of information between Staff and AmerenUE about AmerenUE's gas supply plan.

- The parties agree that AmerenUE will not seek to extend the GSIP in its current form beyond May 31, 2002, but the parties are not precluded from proposing a revised incentive plan to take effect upon the expiration of this GSIP on May 31, 2002.

Based on the discussion above, Staff recommends that the Commission approve the stipulation prior to the proposed beginning of the one year extension, which is June 1, 2001.

No other party filed a response to Staff's pleading.

Findings and Decision

There is no need for a hearing since no party requested a hearing. The requirement for a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. If no party requests a hearing, the Commission may determine that a hearing is not necessary and that the Commission may make a decision based on the stipulation.²

Even though one of the parties, i.e., Public Counsel, did not participate in the case, the Commission is treating the stipulation as unanimous because no one has requested a hearing. Commission Rule 4 CSR 240 2.115(1) states:

A nonunanimous stipulation and agreement is any stipulation and agreement which is entered into by fewer than all parties and where one...or more parties requests a hearing of one...or more issues. If no party requests a hearing, the commission may treat the stipulation and agreement as a unanimous stipulation and agreement.

² See *State ex rel. Deffenderfer Enterprises, Inc. v. P.S.C.*, 776 S.W.2d 494, 496 (Mo. App. 1989).

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The Commission concludes that all issues were settled by the stipulation. The Commission has the legal authority to accept a stipulation and agreement offered by the parties as a resolution of issues raised in a case. Section 536.060, which allows parties to dispose of cases by stipulation with summary action that waives procedural requirements, states:

Contested cases...may be informally resolved by consent agreement or agreed settlement or may be resolved by stipulation, consent order, or default, or by agreed settlement where such settlement is permitted by law. Nothing contained in sections 536.060 to 536.095 shall be construed (1) to impair the power of any agency to take lawful summary action in those matters where a contested case is not required by law, or (2) to prevent any agency authorized to do so from assisting claimants or other parties in any proper manner, or (3) to prevent the waiver by the parties (including, in a proper case, the agency) of procedural requirements which would otherwise be necessary before final decision, or (4) to prevent stipulations or agreements among the parties (including, in a proper case, the agency).

Thus, the Commission will approve the stipulation filed by Staff and AmerenUE.

IT IS THEREFORE ORDERED:

1. That the Missouri Public Service Commission approves the stipulation and agreement filed on May 16, 2001, by Union Electric Company, d/b/a AmerenUE, and the Staff of the Missouri Public Service Commission, and whose terms are set forth in Attachment A.
2. That this order shall become effective on June 1, 2001.

Lumpe, Ch., Murray and Simmons CC., concur
Gaw, C., not participating

Hopkins, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

**In the Matter of the Application of Hotel Associates, Inc., for
Authority to Sell Its Water Plant, Certificate, and Related
Assets to Kimberling Investments, Inc.**

*Case No. WM-2001-435
Decided June 5, 2001*

Water §8. The Commission approved the sale and transfer of assets of a water utility system related to underlying sale of commercial development where new owners agreed to Staff's conditions and demonstrated ability to operate system. The transfer would not be detrimental to the public interest.

**ORDER GRANTING CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY
AND
ORDER APPROVING SALE OF ASSETS**

On February 9, 2001, Hotel Associates, Inc. (HA or seller) and Kimberling Investments, Inc. (KI or purchaser) filed their joint application requesting the Commission's order authorizing HA to sell its waterworks, water well and related assets (the "water system") to KI. HA seeks authorization to terminate its responsibilities as a public utility in Missouri. KI seeks a certificate of public convenience and necessity, if necessary, and in this regard seeks further to adopt the terms, conditions and rates contained in HA's existing tariffs, or to file new tariffs substantially similar to the tariffs of HA, as deemed necessary to effect the transaction presented by the parties.

The Staff of the Missouri Public Service Commission filed its recommendation and memorandum on May 11, 2001, recommending approval of the application with certain conditions.

The Office of the Public Counsel filed its response to the Staff recommendation on May 15, 2001, concurring with the Staff position.

The applicants did not reply to the Staff and Public Counsel responses and did not raise any objections to the Staff recommendations and conditions. No party requested a hearing in this matter. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

The Application

HA is an Arkansas corporation with its principal place of business at 9883 Highway 62, East Henderson, Arkansas. It holds a certificate to transact business in Missouri as a foreign corporation. HA was granted a certificate of service authority as a water corporation in Case No. WA-99-137 (February 1, 2000) for a specific service area in Stone County, Missouri, served by the water system that is the subject of this case.

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KI is a Missouri corporation with its principal office located in Kimberling City, Missouri. It is engaged generally in the business of owning and operating condominiums.

According to the Applicants and the Commission's Staff, the water system in this case is associated with a condominium development in Stone County, Missouri. The water system serves two commercial customers and does not presently serve any residential customers directly. One of the commercial customers is a 28-unit condominium building with one meter for the building and the second customer is a strip mall shopping center.

KI has entered a real estate contract of sale to acquire the condominium development and in conjunction with that purchase KI is also purchasing the water system. KI's board of directors executed a Unanimous Consent Agreement on January 25, 2001, resolving to undertake all actions required to effect KI's acquisition of the water system including the submission of the Joint Application filed in this case.

KI requested that the Commission waive the requirements of 4 CSR 240-2.060(4)(A)(5) related to its request for a certificate of convenience and service authority. This rule requires the filing of a feasibility study, construction estimates and financing, cost and revenue plans associated with developing a utility system. Since the water system is already in place and operating this request may be granted.

KI also proposes to provide water utility services in the same service area as granted to HA in Case No. WA-99-137. KI adopted by reference the legal description and service area map presented in HA's application, and as finally approved, in Case No. WA-99-137.

KI submitted corporate financial data with its application and documentation to verify its corporate status. KI stated that the proposed transaction presented no local tax impact since there will be no change in the water system facilities as a result of the transaction. The applicants stated that neither of the corporations has any pending actions or final unsatisfied judgments or decisions against them occurring in the last three years from any state or federal agency or court which involve customer service or rates. The applicants stated that no annual reports or regulatory assessment fees are overdue in Missouri.

Staff Recommendations

The Staff reviewed the technical, managerial and financial capacity of KI to operate a water utility and concluded that KI possessed the capabilities to operate the water system and serve the public interest. The Staff further concluded that the sale of assets would not be detrimental to the public interest.

Staff recommended that the Commission issue KI a certificate of convenience and service authority to be effective upon the date KI's tariff becomes effective. Staff recommends that KI adopt HA's tariff. Effective with the adoption of the tariff, Staff recommends that the Commission cancel HA's certificate. Staff further recommends that the tariff rates be subject to a rate review by November 16, 2001, as was specified in Case No. WA-99-137, that KI adopt the existing depreciation rates approved in Case No. WA-99-137 and that KI keep its records in accordance with the Uniform System of Accounts.

Under the application and pursuant to Staff's recommendations, KI would essentially assume the management and operation of the water system under initial conditions similar to those that presently apply to HA.

Findings and Conclusions

The Commission may grant a certificate of service authority pursuant to §393.170, RSMo 2000,¹ where it is necessary and convenient for the public service. *State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593 (Mo. App. 1993). A sale of assets of a public utility may be authorized pursuant to §393.190 where the sale is not detrimental to the public interest. *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. 1980).

The requirements of 4 CSR 240-2.060(4)(A)(5) related to the filing of feasibility, cost and revenue studies are waived pursuant to KI's request.

Upon review of the application and Staff's recommendation, the Commission finds that KI is a "water corporation" and "public utility" as defined in §§386.020(42) and (58). Pursuant to §393.170 the Commission finds that it is necessary and convenient for the public service for KI to exercise authority as a water corporation to acquire, build, construct, operate and maintain a water system and all other facilities necessary for the purpose of rendering water service to the public located in the service area as described in the map and the metes and bounds description presented and approved in Case No. WA-99-137.

Pursuant to §393.190 the Commission finds that the proposed sale of the water system is not detrimental to the public interest and HA is authorized to sell and KI to purchase the water system as presented in the application. The conditions and recommendations presented by Staff are approved. HA's certificate of service authority will be canceled and this case will be closed when KI files its tariff adoption notice in accordance with the terms of this order.

IT IS THEREFORE ORDERED:

1. That the requirements of 4 CSR 240-2.060(4)(A)(5) are waived.
2. That the sale by Hotel Associates, Inc., to Kimberling Investments, Inc., of the water system as presented in the application is approved.
3. That Kimberling Investments, Inc., is granted a certificate of public convenience and necessity to acquire, build, construct, operate, and maintain water system facilities and to render water service for the public located within the area in Stone County, Missouri, as described by the map and the metes and bounds description as finally submitted and approved in Case No. WA-99-137.
4. That the certificate of convenience and necessity referenced in ordered paragraph 3 shall become effective simultaneous with the effective date of the tariff adoption notice filed by Kimberling Investments, Inc., in the form recommended by the Commission's Staff and further that the adoption notice shall be filed within ten days of the effective date of this order.
5. That this case shall not be closed and that the certificate of convenience and necessity of Hotel Associates, Inc., granted in Case No. WA-99-137, shall not be canceled until ordered by the Commission based upon compliance with ordered paragraph 4.

¹All statutory references are to the Revised Statutes of Missouri 2000 unless otherwise noted.

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6. That Kimberling Investments, Inc., shall adopt depreciation rates that were approved in Case No. WA-99-137 and that Kimberling Investments, Inc., shall keep its accounts in accordance with the Uniform System of Accounts.

7. That the Staff of the Commission shall conduct a rate review by November 16, 2001.

8. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions or expenditures herein involved.

9. That the Commission reserves the right to consider the ratemaking treatment to be afforded the properties, transactions, and expenditures herein involved in a later proceeding.

10. That this order shall become effective on June 15, 2001.

Lumpe, Ch., Murray, Simmons and Gaw, CC., concur

Thornburg, Regulatory Law Judge

In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996.

Case No. TO-2001-455

Decided June 7, 2001

Telecommunications §46.1. The Commission resolved this arbitration by directing the parties, in most cases, to adopt the corresponding provisions of the so-called M2A, a draft interconnection agreement proposed by Southwestern Bell, and approved by the Commission, in conjunction with Bell's Section 271 application.

APPEARANCES

Kevin K. Zarling, Senior Attorney, AT&T Communications of the Southwest, Inc., 919 Congress Avenue, Suite 900, Austin, Texas 78701-2444, for AT&T Communications of the Southwest, Inc.

Patrick R. Cowlshaw, Esq., Cohau, Simpson, Cowlshaw & Wulff, LLP, 350 North St. Paul, Suite 2700, Dallas, Texas 75201, for AT&T Communications of the Southwest, Inc., including its subsidiary TCG.

Paul S. DeFord, Esq., Lathrop & Gage, 2345 Grand Boulevard, Kansas City, Missouri 64108, for AT&T Communications of the Southwest, Inc.

Paul G. Lane, General Attorney-Missouri, *Leo J. Bub*, Senior Counsel, and *Anthony K. Conroy*, Attorney, Southwestern Bell Telephone Company, One Bell Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company.

Bruce H. Bates, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360 Jefferson City, Missouri, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

ARBITRATION ORDER

Procedural History

On February 20, 2001, AT&T Communications of the Southwest, TCG St. Louis, Inc., and TCG Kansas City, Inc. (collectively, AT&T),¹ filed a joint petition for arbitration with the Commission pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code (the Act), and its implementing regulations, and pursuant to Section 386.230, RSMo 2000.² The petition asked the Commission to arbitrate unresolved issues in the successor interconnection agreement between AT&T and Southwestern Bell Telephone Company (SWBT).

The Commission issued its Notice of Petition for Arbitration and Order Adding Parties, Setting Prehearing Conference and Requiring the Filing of a Proposed Procedural Schedule on February 27. The Commission made SWBT a party and directed that the Staff of the Missouri Public Service Commission (Staff) participate as a party. The Commission further set a prehearing conference for March 9 and directed that the parties prepare and jointly file a proposed procedural schedule by March 16.

The prehearing conference was held as scheduled on March 9. On March 15, AT&T filed its first and second motions to amend its petition, to reflect that certain issues had been settled and no longer required arbitration. On March 16, SWBT timely filed its response to AT&T's petition for arbitration. Also on March 16, the parties each submitted a proposed procedural schedule. On March 27, Staff filed its statement of position regarding setting rates.

On April 5, 2001, the Commission issued its Order Adopting Procedural Schedule, in which the Commission adopted procedural rules for the conduct of the arbitration. On April 6, the Commission set a second prehearing conference for April 11 in order to clarify the application of the FCC rules to this proceeding. That prehearing conference was conducted as scheduled. Also on April 6, the Commission by order provided guidance to the Staff concerning the nature of its participation in this case and the form which its contributions were expected to take.

The Protective Order:

Together with its petition, AT&T filed a motion for a protective order, seeking thereby a protective order of a more expansive nature than the Commission's standard protective order. As an example, AT&T enclosed a copy of a protective order used in administrative proceedings in Texas. On February 23, SWBT

¹ For convenience sake, the Commission will refer to the Petitioners in the singular.

² All references herein to the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 2000.

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responded in opposition to AT&T's request for a Texas style protective order. On March 7, AT&T replied to SWBT's response in opposition to AT&T's motion for a Texas style protective order. On March 9, SWBT filed its suggestions in response to AT&T's reply of March 7.

The parties advised the Commission on April 3, 2001, that they had reached agreement on the protective order issue and desired the Commission to issue its standard protective order. The Commission did so on April 4.

Intervention:

On March 29, 2001, the Missouri Independent Telephone Group (MITG) filed its application for intervention pursuant to Commission Rule 4 CSR 240-2.075. SWBT responded in opposition on April 4, as did AT&T on April 9. MITG replied on April 12 and SWBT filed a response to MITG's reply on April 23.

The MITG is a group of seven small, rural local exchange companies. Under the Act, they are Rural Telephone Companies. They sought to intervene because:

[T]he prior interconnection agreement (IA) between AT&T and SWBT has been the pattern for most IAs in Missouri, these IAs have addressed access traffic originated by CLECs destined for termination to the MITG companies without MITG company consent thereto, and the MITG has no reason to believe that AT&T and SWBT will not similarly attempt to address this traffic in this proceeding, which could adversely impact, prejudice, or discriminate against the MITG companies in violation of 47 U.S.C. [Section] 252(e).

SWBT, in opposition to MITG's application, pointed out that the Commission has uniformly refused to permit intervention in arbitrations under the Act on the grounds that the Act does not contemplate the intervention of third parties into the private contract negotiations of the parties. AT&T concurred in SWBT's position. In its lengthy reply, MITG reiterated its position that it must be permitted to intervene because the resulting interconnection agreement will affect its members. SWBT's response to that reply restated the position of SWBT and AT&T that third parties have no place in this arbitration and suggested that the procedural rules adopted by the Commission for this arbitration, like the Act, do not contemplate intervention.

The Commission denied MITG's Application to Intervene on May 7, 2001, reasoning that there is no place in the arbitration scheme created by the Act for intervenors and that MITG might appropriately become involved at a later time.

The Arbitration Hearing:

The Commission conducted an evidentiary hearing on May 9, 10, 11, 14, and 15, 2001, at its offices in Jefferson City, Missouri. Each party was represented by counsel and was permitted to offer the testimony of witnesses and other evidence. Cross examination was permitted, although it was subject to time limitations pursuant to the Commission's Order Adopting Procedural Schedule of April 5. No party made any objection to the time limitations imposed on cross examination by the Commission. To facilitate questioning by the Commission, all

witnesses for a particular topic were generally required to be present throughout the hearing on that topic.

At the opening of the hearing, certain pending motions were granted.

Posthearing Proceedings:

On May 17, 2001, the presiding officer convened an on-the-record telephone conference call in order to inquire of the parties whether or not any of the decision points (DPs) in this case concerned matters not covered by the M2A.³ AT&T stated that it could not respond immediately and requested an opportunity to review the M2A and the Decision Point List (DPL). The presiding officer directed AT&T to review the M2A and the DPL and to file a pleading listing any DPs that it believed were not reflected by provisions of the M2A. On May 23, AT&T filed its pleading as directed. On May 24, the Commission issued its Order Directing Filing, allowing other parties to respond to AT&T by May 31.

Meanwhile, the parties filed their initial briefs on May 25 pursuant to the procedural schedule. SWBT filed its response to AT&T's identification of non M2A DPs on May 31. On June 1, the parties filed their reply briefs and their proposed findings of fact and conclusions of law.

On June 4, 2001, the Commission again convened an on-the-record telephone conference call in order to address certain questions to the parties.

Discussion

The parties submitted the open issues requiring resolution in the form of a Decision Point List (DPL). This is a voluminous document containing over one hundred specific disputed points requiring resolution by the Commission.⁴ These points fall into five topical categories:

1. Cost issues (17).⁵
2. General terms and conditions, including intellectual property issues (19).
3. Unbundled Network Elements (UNEs) terms and conditions (68).
4. Network interconnection issues (20).
5. Operations Support Systems (OSS) issues (4).

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

³The M2A is an interconnection agreement extended by SWBT to any carrier in Missouri. It was developed in the context of Case No. TO-99-227, SWBT's Section 271 case. Because the M2A met all of the Commission's minimum criteria for finding the existence of competition, the Commission ultimately provided a favorable recommendation to the FCC with respect to SWBT's Section 271 application.

⁴There are a total of 128 Decision Points.

⁵The parenthetical number is the number of Decision Points identified by the parties in each topical category.

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The Parties:

The parties are AT&T and SWBT, two telephone companies. SWBT is a local exchange carrier (LEC) and provides local exchange telephone service in Missouri and twelve other states. SWBT also provides intraLATA long-distance telephone service. AT&T provides intraLATA and interLATA long-distance telephone service in Missouri and also provides local exchange telecommunications services to business customers in Missouri. To the extent that AT&T provides local exchange telephone service in Missouri, it is a competitive local exchange carrier (CLEC).

Background to the Dispute:

The present arbitration must be considered within the larger context of the implementation of the Telecommunications Act of 1996 in Missouri and the previous arbitrations between AT&T and SWBT.

**Previous Arbitrations Between AT&T and SWBT:
Cases Nos. TO-97-40 and TO-98-115**

The original arbitration between AT&T and SWBT in Missouri was Case No. TO-97-40, filed by AT&T on July 29, 1996.⁶ Following a hearing and briefing by the parties, the Commission issued its Arbitration Order on December 11, 1996.⁷ In this order, the Commission rejected SWBT's cost studies because they "failed to provide adequate prices for the unbundled elements in an efficient, forward-looking network."⁸ The Commission modified the results of SWBT's cost studies as recommended by Staff and then used the modified figures to set interim prices for various unbundled network elements (UNEs) and resold services, stating that "[a]t a later date the Commission will adopt a cost methodology to set permanent prices."⁹

Thereafter, on January 22, 1997, the Commission granted clarification and modification of its arbitration order, modifying eight items and setting a schedule for the development of permanent rates by the Commission's Arbitration Advisory Staff (AAS).¹⁰ The AAS was directed to conduct an intensive, 16-week investigation

⁶ Later consolidated with a similar petition filed by MCI on August 16, 1996, Case No. TO-99-67.

⁷ *In the Matter of AT&T Communications of the Southwest Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-97-40 (Arbitration Order, issued December 11, 1996).

⁸ *Id.*, at 33.

⁹ *Id.*

¹⁰ *In the Matter of AT&T Communications of the Southwest Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-97-40 (Order Granting Clarification and Modification and Denying Motion to Identify and Motions for Rehearing, issued January 22, 1997).

of SWBT's costing models, including identification of critical inputs and analysis of the models.¹¹ To this end, the Commission directed the AAS to meet intensively with each party, privately, in order to facilitate the free exchange of confidential information. In the case of SWBT, at least, the meetings were held at SWBT's St. Louis offices, where data and personnel were readily available.

On July 31, 1997, the Commission issued its Final Arbitration Order.¹² Concerning the efforts of the AAS, the Commission stated:

The process of reviewing the costs, discounts and proposed rates was designed so that Southwestern Bell Telephone Company (SWBT), AT&T Communications of the Southwest, Inc. (AT&T) and MCI Telecommunications Corporation (MCI) could designate the appropriate subject matter expert (SME) or provide documentation in support of its position. As a result, the process led to a remarkable level of open communication and cooperation between SWBT, AT&T, MCI and the Arbitration Advisors. The work which has resulted from this effort consumes several hundred pages and constitutes a thorough and exhaustive review of each and every cost factor which the Commission finds relevant to this arbitration. This "Costing and Pricing Report" is Attachment C. A similar document containing highly confidential information has been filed and provided to the parties pursuant to the Commission's procedures set out in its Protective Order.¹³

The Final Arbitration Order set permanent rates. Attached to it, in addition to the extensive *Costing and Pricing Report* referred to above, were the *Resale Cost Study for Southwestern Bell Telephone Company* (Attachment A) and *Permanent Rates for Unbundled Network Elements* (Attachment B).

Several requests for reconsideration or clarification were filed in response to the Final Arbitration Order. On October 2, 1997, the Commission revisited some of the items contained in the Final Arbitration Order and directed the parties to file a conforming interconnection agreement.¹⁴ The parties complied on October 10

¹¹*Id.*, at 9-10.

¹²*In the Matter of AT&T Communications of the Southwest Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-97-40 (Final Arbitration Order, issued July 31, 1997).

¹³*Id.*, at 2-3. The 8th Circuit, on the other hand, said this about the efforts of the AAS: "[W]e caution the PSC to be more circumspect in the process it employs, with particular attention to excessive reliance on staff reports, especially those reports compiled after unnecessary ex parte discussions with parties." *Southwestern Bell Telephone Company v. Missouri Public Service Commission et al.*, 236 F.3d 922, 925 (8th Cir. 2001).

¹⁴*In the Matter of AT&T Communications of the Southwest Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-97-40 (Arbitration Order Regarding Motions for Clarification and Reconsideration and Joint Motion for Expedited Resolution of Issues, issued October 2, 1997).

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and the Commission approved the agreement on November 5, 1997.

Meanwhile, on September 10, 1997, AT&T filed a second petition for arbitration, Case No. TO 98-115, presenting for resolution various issues not included in the first case. Following proceedings including a preliminary mediation before the Commission's General Counsel, serving as a special master, the Commission issued its Report and Order on December 23, 1997.¹⁵ Among other things, this order set interim prices for certain network elements and services not covered by Case No. TO-97-40.¹⁶ The interim prices were simply those proposed by SWBT, without modification, adopted on an interim basis, subject to true up.¹⁷ The parties filed their conforming interconnection agreement on March 4, 1998, and the Commission approved it on March 19. The Commission has not yet set permanent prices in Case No. TO-98-115.

Both arbitrations were appealed to United States District Court pursuant to the provisions of the Act. The District Court affirmed the Commission's arbitration decisions, except that it remanded issues of dark fiber and subloops for further consideration by the Commission and reversed the Commission on the issue of the limitation of SWBT's liability to AT&T's customers.¹⁸

Upon further appeal, the United States Court of Appeals reversed the District Court and vacated the Commission's decisions in TO-97-40 and TO-98-115.¹⁹ The court took this action, not because of any error of interpretation or procedure by the Commission, but because the Commission had applied the FCC's mandated TELRIC costing and pricing methodology.²⁰ "We therefore conclude that the holding in *Iowa Utilities II* invalidating the TELRIC pricing methodology requires that the entire arbitrated agreement approved by the PSC in this case be vacated and that further proceedings (assuming that AT&T still wants access to SWBT's network in Missouri) be held."²¹

A further appeal was taken and is now pending before the United States Supreme Court. In the event of final success in its quest to invalidate the FCC's TELRIC costing methodology, SWBT anticipates that a "retroactive true up" will be conducted.

¹⁵ *In the Matter of AT&T Communications of the Southwest Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-98-115 (Report and Order, issued December 23, 1997).

¹⁶ *Id.*, at 23 ff.

¹⁷ See *In the Matter of SBC Communications, Inc., Southwestern Bell Telephone Company, and South Western Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In region, InterLATA Services in Missouri*, CC Docket No. 01-88 (Evaluation of the United States Department of Justice, May 9, 2001) at 18.

¹⁸ *AT&T Communications of the Southwest, Inc., et al. v. Southwestern Bell Telephone Company et al.*, 86 F.Supp.2d 932 (W.D. Mo. 1999).

¹⁹ *Southwestern Bell Telephone Company v. Missouri Public Service Commission et al.*, 236 F.3d 922, 924 and 927 (8th Cir. 2001).

²⁰ *Id.*

²¹ *Id.*, at 924.

Case No. TO-99-227 and the M2A

On November 20, 1998, SWBT notified the Commission that it intended to seek authority from the FCC to provide interLATA telecommunications services in Missouri under Section 271 of the Act. This provision bars the Bell operating companies (BOCs), such as SWBT, from entering the interLATA long-distance market without prior approval from the FCC. FCC approval is conditioned on its finding that certain statutory measures of competition have been met in the state in question.²²

Thereafter, the Commission opened Case No. TO-99-227 and held proceedings in order to determine whether it could support SWBT's quest for authority to enter the interLATA long-distance market by giving a positive recommendation to the FCC pursuant to Section 271(d)(2)(B) of the Act. That provision requires the FCC to consult with the state commission "to verify the compliance of the Bell operating company with the requirements of subsection (c)." A positive recommendation could be made only if either the Commission determined that SWBT had entered into a binding interconnection agreement with at least one facilities-based competitor or the Commission approved a statement by SWBT of the terms and conditions upon which it generally offered to provide interconnection and access to UNEs.²³ In either case, the interconnection agreement or statement of terms and conditions was required to satisfy the 14-point checklist at Section 271(c)(2)(B) of the Act.

To meet the 14 point checklist and thereby secure a favorable recommendation from the Commission, SWBT tendered on June 28, 2000, a model interconnection agreement for Commission approval; this agreement is referred to as the M2A.²⁴ The M2A is modeled upon an agreement negotiated in the course of SWBT's Section 271 proceeding in Texas, the T2A, which has been approved by the FCC.²⁵ The M2A was further modified after June 28 in response to comments by parties and interim position statements by the Commission.²⁶ The final revisions were filed on February 28, 2001.²⁷ The M2A includes binding terms for interconnection

²² 47 U.S.C. Section 271(d)(3).

²³ 47 U.S.C. Section 271(c)(1), (A) and (B), and Section 252(f).

²⁴ The M2A is SWBT's statement of the terms and conditions upon which it generally offers access and interconnection.

²⁵ *In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act*, Case No. TO-99-227 (Order Finding Compliance with the Requirements of Section 271 of the / Telecommunications Act of 1996, issued March 6, 2001) (hereinafter the "271 Compliance Order") at 2.

²⁶ *Id.*, at 3.

²⁷ *Id.*

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and for access to UNEs, including UNEs not currently combined in SWBT's network, and for the resale of services.²⁸

On March 6, 2001, the Commission determined that the M2A met the 14 point checklist of Section 271, as well as the other requirements of the Act applicable to interconnection agreements.²⁹ The Commission further determined that the public interest supported SWBT's entry into the interLATA long-distance market in Missouri, so long as the M2A was made available to Missouri CLECs.³⁰ The M2A incorporates prices from the Commission's arbitration decisions in Cases Nos. TO-97-40 and TO-98-115.³¹ Three "spin-off dockets" were also initiated, in order to determine costs and prices for certain other elements.³² The results of these cases will be inserted into the M2A when they become available.³³

SWBT's Section 271 Application

Having obtained a favorable recommendation from the Missouri Commission, SWBT filed a formal application under Section 271 with the FCC.³⁴ That application is pending and the FCC has not yet ruled upon it, either favorably or unfavorably. The Act requires that the FCC consult with the Attorney General of the United States as well as with the State commission prior to ruling on a Section 271 application.³⁵ To that end, the Department of Justice (DOJ) filed its Evaluation of May 9, 2001, a copy of which was received without objection in this proceeding as Exhibit 60.

The DOJ Evaluation focuses on the prices at which SWBT offers UNEs in Missouri.³⁶ In its Evaluation, DOJ urged the FCC to "undertake an independent scrutiny of the prices at issue rather than rely on the Missouri Public Service

²⁸ *In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act*, Case No. TO-99-227 (*Report & Order*, issued March 15, 2001) (hereinafter the "271 Report & Order") at 17-19.

²⁹ 271 Compliance Order, at 3-4.

³⁰ *Id.*

³¹ 271 Report & Order, at 16.

³² *In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act*, Case No. TO-99-227 (*Report & Order*, issued March 15, 2001), at 18. The cases are TO-2001-438 (certain UNEs); TO-2001-439 (xDSL capable loops); and TO-2001-440 (line splitting and line sharing). A fourth pending case concerns collocation, TT-2001- 298. The latter is distinct from the others as it concerns a tariff proposed by SWBT setting prices, terms and conditions for physical and virtual collocation.

³³ *Id.*

³⁴ See 47 U.S.C. Section 271(d)(1). SWBT's application is CC Docket No. 01-88.

³⁵ 47 U.S.C. Section 271(d)(2), (A) and (B). SWBT brought Case No. TO-99-227 in order to ensure that the Missouri Commission would provide a favorable recommendation upon consultation pursuant to 47 U.S.C. Section 271(d)(B).

³⁶ *In the Matter of SBC Communications, Inc., Southwestern Bell Telephone Company, and South Western Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-region, InterLATA Services in Missouri*, CC Docket No. 01-88 (*Evaluation of the United States Department of Justice*, May 9, 2001) (hereinafter "DOJ Evaluation") at 1.

Commission’s . . . price-setting decisions” because “[p]rices in Missouri are higher than those in neighboring states[.]”³⁷ Specifically, DOJ pointed out that “the UNE recurring rates set in Docket No. 97-40 exceed by a significant margin those rates set in states in which SBC has already obtained section 271 approval.”³⁸ The Evaluation asserts that switch prices in Missouri exceed those in Texas and Kansas by 22 to 60 percent.³⁹ Loop rates also exceed those in other SWBT states, averaging 20 percent higher.⁴⁰ Some nonrecurring rates are also “significantly higher than those in other states.”⁴¹

Likewise, “[t]he rates set in Docket No. 98-115 exceed by a vast margin the rates for similar UNEs set in states in which SBC has already obtained section 271 approval.”⁴² Recurring charges in Missouri are two to six times those in Texas, Kansas and Oklahoma.⁴³ Nonrecurring charges in Missouri are two to 13 times those in Texas, Kansas and Oklahoma.⁴⁴ DOJ concludes that differences in costs do not explain these disparities; indeed, the FCC’s Universal Service Fund cost model suggests that Missouri costs are “nearly identical” to those of Kansas, an adjacent state.⁴⁵ As an additional matter of concern, DOJ states that there is a question “whether SBC is offering DSL services to end users without making those services available for resale at a wholesale discount.”⁴⁶

Resolution of Open Issues:

Costing and Pricing

1. Should all UNEs to be arbitrated by the Missouri PSC have price levels established based on costs?

All of the parties agree that the Act requires that UNE prices be based on costs.

2. What Cost Study Methodology should the Commission utilize in determining UNE rate levels?

All of the parties agree that the Commission must employ the FCC’s TELRIC⁴⁷ pricing methodology in setting UNE rates.

³⁷*Id.*, at 2.

³⁸*Id.*, at 10.

³⁹*Id.*

⁴⁰*Id.*, at 10-11.

⁴¹*Id.*, at 11.

⁴²*Id.*, at 12.

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.*, at 20.

⁴⁷Total Element Long Run Incremental Cost.

4. What UNE rates should be adopted by the Missouri PSC for the AT&T/SWBT Agreement?

SWBT has proposed rates greater than the rates contained in the M2A.⁴⁸ These rates are supported by cost studies of various vintages.⁴⁹ AT&T, complaining vigorously that it has not had a sufficient opportunity to deconstruct SWBT's cost studies, proposes that the Commission adopt recurring rates developed in the Kansas Section 271 proceeding and nonrecurring rates developed in the Texas Section 271 proceeding as interim rates and establish an adequate procedure for setting permanent rates.⁵⁰ Some of the Kansas and Texas 271 rates are lower than the corresponding rates contained in the M2A. Staff agrees in part with AT&T, advising the Commission to adopt the M2A rates as interim rates and to establish an adequate procedure for setting permanent rates.⁵¹ In the alternative, Staff suggests that the Commission adopt the M2A rates as permanent rates for the term of this agreement.⁵²

AT&T argues that the cost studies supporting SWBT's proposed "massive increase in basic UNE rates" contain critical flaws.⁵³ Additionally, the available interval for examining and analyzing these cost studies was inadequate.⁵⁴ AT&T asserts that the Commission ought not to set rates based on flawed and unexamined cost studies.⁵⁵ Staff agrees that there are problems with SWBT's cost studies, stating "[s]everal concerns center around discrepancies between new inputs and those utilized in the Commission approved M2A rates. These include the appropriate forward-looking cost of capital, annual charge factors, and the common cost allocator to be utilized in a TELRIC-based cost study."⁵⁶ Even SWBT's witnesses admitted the inadequacy of some of their cost studies.⁵⁷

SWBT asserts that the Commission must adopt its proposed rates because they are the only ones in evidence that are supported by Missouri cost studies

⁴⁸Exhibit 22, the testimony of Staff witness Christopher Thomas, at 6.

⁴⁹*Id.*, at 3.

⁵⁰*Id.*, at 4; *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (*AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City's Initial Post-Hearing Brief*, filed May 25, 2001) (hereinafter "*AT&T's Brief*") at 1-3.

⁵¹Exhibit 22 at 5.

⁵²*Staff's Reply Brief* at 5.

⁵³*AT&T's Brief* at 1.

⁵⁴*Id.*, at 2.

⁵⁵*Id.*

⁵⁶Exhibit 22 at 7.

⁵⁷Exhibit 5, testimony of SWBT's witness Thomas Makarewicz, at 3-4: "SWBT did not have time to update the remaining studies"; Exhibit 7, testimony of SWBT's witness Cherylann Mears, at 9: "SWBT did not have time to rerun all of the studies required for this arbitration."

employing the TELRIC methodology.⁵⁸ SWBT contends that adoption of AT&T's pricing proposal would be unlawful.⁵⁹ SWBT further argues that voluntary concessions made to obtain Section 271 relief cannot be imposed, in another state, via compulsory arbitration.⁶⁰ Rather, the Commission must adhere to the pricing standards contained in the Act and the evidence presented in this case.⁶¹ Finally, SWBT points out that the short timeframe of the arbitration process is set by the Act.⁶² SWBT also suggests that AT&T's long familiarity with its cost studies, as well as its considerable resources, act to mitigate any prejudicial affect of the arbitration timetable.⁶³

The Commission will resolve this Decision Point (DP) by directing the parties to adopt the M2A rates. The Commission will not implement substantial increases in prices for basic UNEs based on the cost studies submitted in this case by SWBT. Many of these cost studies are of 1996 vintage and were rejected after close scrutiny in Case No. TO-97-40.⁶⁴ Others are of later vintage, but have never been thoroughly reviewed.⁶⁵ The Commission agrees that such review was not possible in the context of this arbitration because of the strict timeframe imposed by the Act.

Likewise, the Commission will not adopt the Kansas and Texas rates suggested by AT&T. Although these rates have been scrutinized and approved by other state commissions and the FCC, they are not supported by any evidence showing their relevance to Missouri. Indeed, the fact that they are lower than the corresponding M2A rates, which were recently reviewed by Staff and found to be justified⁶⁶ and recently approved by the Commission as compliant with the Act,⁶⁷ permits the inference that they are not accurate for Missouri.

The Commission takes notice of the M2A, including the rates contained therein. The M2A was the product of a lengthy proceeding and close scrutiny. The Commission has already determined that it complies with all of the standards applicable to interconnection agreements, including the 14-point checklist in Section 271.⁶⁸ The Commission concludes that the M2A rates are appropriate for inclusion in the parties' agreement.

⁵⁸ *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (*Initial Brief of Southwestern Bell Telephone Company*, filed May 25, 2001) (hereinafter "SWBT's Brief") at 16.

⁵⁹ *Id.*, at 17.

⁶⁰ *Id.*, at 18.

⁶¹ *Id.*

⁶² At 47 U.S.C. Section 252(b)(4)(C).

⁶³ *Id.*, at 19.

⁶⁴ Exhibit 17, testimony of AT&T's witness R. Matthew Kohly, at 4.

⁶⁵ *Id.*

⁶⁶ Exhibit 22 at 4.

⁶⁷ *271 Report & Order*, at 68.

⁶⁸ *Id.* and *271 Compliance Order* at 4.

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Because it is known to be compliant with both the Act and the FCC's regulations, the Commission concludes that the M2A is generally appropriate as a resolution of the parties' dispute. Many, if not most, of the provisions of the parties' agreement are drawn from the M2A.⁶⁹ On May 17, the Commission directed the parties to identify those DPs for which there is no corresponding provision in the M2A. AT&T filed its list on May 23; SWBT responded on May 31. The Commission will resolve all open issues not identified by AT&T as non M2A issues in its filing of May 23 by directing the parties to adopt the corresponding provisions of the M2A. With respect to the Costing and Pricing category, DPs 3, 5-15, and 17 are so resolved.⁷⁰ The Commission will resolve the non-M2A DPs individually.

General Terms and Conditions

The Commission will resolve all open issues not identified by AT&T as non M2A issues by directing the parties to adopt the corresponding provisions of the M2A. With respect to the General Terms and Conditions category, DPs 3, 7, and 12-16 are so resolved.⁷¹ The Commission specifically resolves the DPs identified by AT&T as non-M2A issues as follows:

1. Should the Agreement contain references to terms and conditions applicable to SBC entities not a party to the Agreement?

6. Should the IA acknowledge that some provisions are voluntary and some involuntary and thus "non-portable" to other jurisdictions?

SWBT takes the position that references to non-Missouri SBC entities and the identification of provisions as voluntary or involuntary are necessary to provide guidance to CLECs as to which provisions are "portable" to other states and which are "non-portable" under the terms of the SBC-Ameritech merger.⁷² AT&T objects to references to non-Missouri SBC entities and also objects to the identification of provisions as voluntary or involuntary. AT&T objects to the former as potentially confusing and as unnecessary clutter; AT&T objects to the latter as unnecessary to this Missouri-specific agreement. Staff takes AT&T's position as to DP 1 but, as

⁶⁹ *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City's Proposed Findings of Fact and Conclusions of Law, filed June 1, 2001) (hereinafter "AT&T's Proposed Findings") at 8.

⁷⁰ DP 16 has been previously settled.

⁷¹ DP 17 has been previously settled.

⁷² *Application of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rule*, CC Docket No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712 (1999) (hereinafter the "SBC Ameritech Merger Order").

to DP 6, recommends a modified version of the language preferred by SWBT. The M2A lacks corresponding provisions because Section 271 interconnection agreement commitments are not portable to other states under the terms of the SBC Ameritech merger.⁷³

The Commission will resolve these DPs by directing the parties to adopt the positions suggested by Staff. Whatever the interest of non-Missouri entities in this agreement, the Commission's concern is necessarily with Missouri. Therefore, the Commission agrees with AT&T and Staff that references to other states and to non-Missouri SBC entities must be excluded unless necessary to the function of this agreement as an agreement between Missouri carriers that will be implemented in Missouri. On the other hand, the identification of voluntary and nonvoluntary provisions is potentially useful to the implementation and interpretation of this agreement in Missouri and so should be adopted in the form proposed by Staff.

2. Should the Agreement set forth its purpose in a series of "Whereas" clauses?

It is customary for contracts to include an opening series of clauses, each beginning "whereas," which express the intent of the parties in making the agreement. These clauses can be helpful if it is necessary later to determine the intent of the parties. AT&T objects to certain of the "whereas" clauses proposed by SWBT on the grounds that they misstate AT&T's intent and improperly seek to limit the scope of this agreement. SWBT contends that the questioned language is necessary to accurately express the parties' intent and objects to any intention by AT&T to use this agreement for purposes other than those contemplated by the Act. The Staff agrees with AT&T that certain of the "whereas" clauses proposed by SWBT are unnecessary. The M2A states that its purpose is local exchange competition; parties may not interconnect under the M2A as an IXC or other nonlocal provider.

The Commission will resolve this DP by directing the parties to adopt the position suggested by Staff. This agreement is fundamentally unlike traditional commercial contracts in that the parties are brought to the table by operation of law and not by the coincidence of their mutual self-interest. Therefore, "whereas" clauses are not important for determining the intent of the parties because there is no coincidence of self interest to define. Rather, it is apparent that AT&T as a CLEC is seeking as much advantage as the law permits, while SWBT as an ILEC is seeking to give away only as much as the law demands. Thus, while some introductory recitations are helpful, they are not generally of much importance in the present circumstances.

4. (A) (AT&T's version) What should the term length be of this Agreement, and what terms and conditions should govern its renewal, termination and expiration, and any transition following termination or expiration? What liability will continue after the expiration of the term?

⁷³ *Id.*, at Para. 43 of Appendix C.

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4. (B) (SWBT's version) What should be the term length of the non-M2A provisions of this Agreement, and what terms and conditions should govern the Agreement's renewal, termination and expiration, and any transition following termination or expiration? What liability will continue after the expiration of the term?

The parties do not agree on the exact issue for determination here. Many, if not most, of the provisions in this agreement derive from the M2A.⁷⁴ AT&T and SWBT refer to these as "Elected Provisions" to distinguish them from the other provisions of this agreement, whether negotiated or arbitrated, which do not derive from the M2A. SWBT favors different terms for different provisions. For the non-Elected Provisions, SWBT proposes a term of one year plus 90 days. For the Elected Provisions, SWBT argues that a term of "conditionally four years" is required by the M2A.

What term length is required by the M2A? Attachment 26 of the M2A identifies the terms and conditions "legitimately related" to various provisions or attachments of the M2A; it requires that CLECs adopting any part of the M2A also adopt certain sections of the M2A's General Terms and Conditions.⁷⁵ One of these—Section 4.1—provides that the agreement will expire one year after approval by this Commission, except that SWBT may extend it for three more years if the FCC has, in the interim, approved SWBT's Section 271 application for Missouri. Thus, the term in question is "conditionally four years" as described by SWBT.

AT&T, in turn, favors a term of three years, renewable for two one-year periods, to "avoid slipping into a continuous re-negotiation time-table."⁷⁶ Staff recommends a three-year term for every provision of the agreement. Staff further recommends that the Commission adopt the language recommended by AT&T, with a single modification which limits the period of liability after the expiration of the agreement. Section 4 of the M2A contains provisions setting the term of the agreement and regulating the relationship of the parties upon expiration.

The Commission will resolve this DP by directing the parties to adopt the position and language recommended by Staff. It is needlessly complex and confusing to assign different term lengths to different provisions of the same agreement.

5. Should the parties have the right to terminate the Agreement for material breach, subject to a notice and cure period, and excepting breach in the form of non-payment, which is addressed by agreed provisions elsewhere in the Agreement?

⁷⁴ AT&T's Proposed Findings at 8.

⁷⁵ Sections 2.1, 2.2, 4.1, 4.1.1, 4.1.2, 4.2, and 4.2.1.

⁷⁶ AT&T's Proposed Findings at 6.

AT&T proposes, at Section 4.2, that the agreement will continue in effect on a month-to-month basis during negotiations by the parties and, if such negotiations are unsuccessful, during arbitration by the Commission. SWBT, in turn, proposes at Section 2.3 to grant to each party a right of unilateral termination upon material breach by the other party that goes uncured for 45 days.

AT&T opposes any right of unilateral termination for material breach because service disruption to customers is a potential result of any such right. AT&T, instead, favors referral of any such disputes to the Commission for resolution. SWBT supports the inclusion of a right to terminate if a material default remains uncured after 45 days. SWBT points out that its proposed language does not prevent dispute resolution as provided for in the agreement. Further, the right to terminate for material breach is “customary and prudent” in commercial contracts.⁷⁷ Staff supports AT&T’s position on this point. The M2A, at Section 10 of its General Terms and Conditions, provides a right of termination only for nonpayment.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by AT&T. This agreement is not like traditional commercial contracts and a provision typically included in such is not necessarily appropriate here. This agreement exists only because Congress has given CLECs like AT&T power to force SWBT to the table. Therefore, the appropriate remedy for a material and continuing breach is not termination but application to this Commission for a remedy.

8. May SWBT recover its costs for implementing name changes initiated by AT&T?

A name change by a business entity interconnected with SWBT can require the alteration of literally hundreds of records, resulting in significant costs to SWBT. SWBT initially proposed language permitting it to recover any such costs. Later, SWBT modified its position and proposed that AT&T could have one free name change per 12-month period. Staff supports SWBT’s modified position. AT&T, on the other hand, argues that such name changes will be a rare event and that any associated costs are an ordinary cost of doing business to SWBT. AT&T objects to paying for these costs. The M2A does not provide for name changes and, therefore, does not provide for the recovery of associated costs.

The Commission will resolve this DP by directing the parties to adopt SWBT’s original position and proposed language. It is appropriate and equitable that the cost causer should underwrite costs resulting from name changes. These costs are not properly a cost of doing business to SWBT, but a cost of doing business to the CLEC that is changing its name.

⁷⁷*In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (*Southwestern Bell Telephone Company’s Proposed Findings of Fact and Conclusions of Law*, filed June 1, 2001) (hereinafter “*SWBT’s Proposed Findings*”) at 8.

9. Should Non-Voluntary provisions (i.e., provisions that result from arbitration) be subject to invalidation or modification in accordance with legally-binding regulatory or judicial rulings?

SWBT proposed language in Section 3.4 that permits a party, upon the modification of any Non-Voluntary provision by judicial or administrative action, to trigger renegotiation of affected provisions of this agreement by giving written notice. The parties' subsequent failure to successfully negotiate appropriate modifications of this agreement within 60 days would permit recourse to the dispute resolution provisions in Section 9. AT&T, in turn, contends that this proposal conflicts with the general intervening law provision at 3.1. Staff contends that other language in Section 3.4 addresses this point. The M2A contains specific change of law provisions at Sections 18.2 to 18.4 of its General Terms and Conditions.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff. The additional language proposed by SWBT is unnecessary.

10. May the parties reserve their rights to appeal or seek other relief from regulatory and legal rulings related to this Agreement, even though they have entered into this Agreement?

SWBT proposed reservation of rights language at Section 3.3 of the General Terms and Conditions of the agreement in order to make it clear that, by entering into this agreement, the parties do not waive their right to pursue various ongoing appeals, such as SWBT's appeal to the United States Supreme Court of the FCC's TELRIC pricing rules. AT&T, in turn, believes that this language is unnecessary because intervening judicial decisions can be implemented through the intervening law provision at 3.1. AT&T also objects to SWBT's attempt to reserve rights to a retroactive true up which may never eventualize. Staff agrees with AT&T that Section 3.1 covers this point adequately. The M2A contains specific change of law provisions at Sections 18.2 to 18.4 of its General Terms and Conditions.

The Commission will resolve this DP by directing the parties to adopt AT&T's position. The parties' entry into a compulsory agreement cannot be read as a waiver of their right to pursue pending litigation, particularly where, as here, the agreement contains no language purporting to state such a waiver. Therefore, the language proposed by SWBT is unnecessary. The effect of the resolution of any pending litigation is adequately covered by Section 3.1.

11. Will a ruling by the Commission on a provision in the interconnection agreement of other carriers be applicable to the substantially similar language in this Agreement?

AT&T contends that the issue is whether Missouri Commission rulings on non-M2A provisions in the interconnection agreements of other carriers will be applied

to the similar non-M2A provisions in this agreement. The M2A has a provision, Section 31.1, on this point, but it applies only to M2A provisions. AT&T believes that it is most efficient to extend this treatment to the non M2A provisions as well.

SWBT believes this treatment, while appropriate for the M2A provisions, is inappropriate for the non-M2A provisions. SWBT believes that disputes regarding those provisions should be resolved on a case-by-case basis by the Commission. Staff agrees with AT&T's position.

The Commission will resolve this DP by directing the parties to adopt SWBT's position because it is not clear what "substantially similar language" means. How are the parties to determine whether or not a provision in another agreement is so similar to a provision in this one that a Commission decision regarding it should automatically be applied to this agreement? It seems better to simply let the parties bring these disputes, should any arise, to the Commission on a case-by-case basis.

18. Should AT&T be able to avoid limitation of liability provisions required by its adoption of portions of the M2A?

This DP also arises out of Attachment 26 to the M2A. Attachment 26 requires that any CLEC adopting M2A Attachment 25 DSL, must also adopt the limitation of liability language at Section 7.1.1, which in turn refers to Sections 7.3.1 and 7.3.6. AT&T has agreed to adopt Section 7.3.1, but objects that Section 7.3.6 is not specifically identified in Attachment 26 as a "legitimately related" provision that must be adopted. AT&T asserts that SWBT is attempting to expand the scope of Attachment 26 by insisting that the agreement include Section 7.3.6. AT&T also objects that the scope of Section 7.3.6 is broad and that it applies to more than simply Attachment 25—DSL.

SWBT, in turn, takes the position that AT&T must adopt all legitimately-related language when it adopts portions of the M2A. SWBT asserts that, by approving the M2A, this Commission has already determined that Section 7.3.6 is legitimately related to Attachment 25—DSL. Staff agrees with SWBT that Section 7.3.6 should be included in the agreement.

The Commission will resolve this DP by directing the parties to adopt SWBT's position and to include Section 7.3.6 in their agreement. The language in question releases, indemnifies and holds SWBT harmless from any damages arising out of a claim that AT&T's access to SWBT's network under this agreement violates the intellectual property rights of any third party. While it is true that this provision is not limited to DSL, it is also true that it is an appropriate component of the parties' agreement.

19. Should M2A language related to M2A UNE Attachment 6 be included in this Agreement, even though AT&T did not adopt M2A UNE Attachment 6?

This is another issue arising out of Attachment 26 of the M2A. Attachment 26 requires that Section 18.2 of the M2A's General Terms and Conditions be adopted by CLECs adopting portions of the M2A adopted herein by AT&T. However, the first

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sentence of Section 18.2 refers to Attachment 6 -- UNEs of the M2A, which AT&T has not adopted for this agreement. Therefore, SWBT contends that Section 18.2 should be modified by the inclusion of language expressly providing that the first sentence of Section 18.2 does not apply to this agreement. Staff agrees with SWBT.

AT&T, in turn, asserts that SWBT should be bound by any ambiguities it has written into the M2A. However, AT&T is not strongly opposed to SWBT's position on this point and has offered to yield if it wins on DP 18, above. In its Proposed Findings and Conclusions, AT&T recommends that the Commission find "that SWBT's modification is appropriate."⁷⁸

The Commission will resolve this DP by directing the parties to adopt the position recommended by SWBT and to include SWBT's proposed modification in Section 18.2. The parties may also consider whether they would rather modify Section 18.2 by omitting the first sentence, in which case SWBT's modification would be unnecessary. No purpose is served by including language applicable only to a provision not included in the agreement, particularly if that provision could be manipulated to produce a result never originally intended.

Unbundled Network Elements (UNEs) Terms and Conditions

The Commission will resolve all open issues not identified by AT&T as non-M2A issues by directing the parties to adopt the corresponding provisions of the M2A. With respect to the UNEs Terms and Conditions category, DPs 1-24, 26-29, 33-34, and 38-68 are so resolved.⁷⁹ The Commission specifically resolves the DPs identified by AT&T as non-M2A issues as follows:

25. Should AT&T's Single Point of Interconnection language be included in the Agreement?

AT&T proposes in Section 5.9 language which would permit a single point of interconnection at a multiunit premises with pricing based on TELRIC principles. SWBT maintains that language at Section 5.8.8 already would permit a single point of interconnection at a multiunit premises with pricing to be determined under the Bona Fide Request (BFR) process. Staff proposes a compromise version of Section 5.9 which would permit a single point of interconnection at a multi-unit premises with pricing to be determined under the BFR process, with a wider range of choices for resolving disputes. The M2A addresses a single point of interconnection at Attachment 11—Network Interconnection Architecture, Sections 1.2 and 1.3, and at Attachment 6—UNEs, Sections 3.2 and 4.6.1.⁸⁰ SWBT suggests that one subissue related to this point is not resolved by the M2A, pointing to Section 1.3 of Attachment 11—Network Interconnection Architecture, which pro-

⁷⁸ AT&T's *Proposed Findings* at 26. This recommendation is conditioned on the Commission finding for AT&T on DP 18.

⁷⁹ DP 35 has been previously settled.

⁸⁰ Attachment 6—UNEs of the M2A has not been adopted for this agreement.

vides only that the parties will attempt to negotiate a solution and, if unsuccessful, will refer the matter to the Commission for resolution.

The Commission will resolve this DP by directing the parties to adopt the position proposed by Staff and to incorporate the language proposed by Staff into their agreement. The Commission agrees that the BFR process is appropriate where nonstandard work is concerned and believes a provision additional to Section 5.8.8 is appropriate.

30. What type of traffic will SWBT route over shared transport?

The parties disagree as to whether SWBT should be required to route AT&T's intraLATA toll traffic over shared transport. SWBT contends that shared transport is, by definition, appropriate for local traffic only. SWBT states that it is appropriate to route AT&T's UNE-P intraLATA calls to the appropriate tandem to be handed off to the intraLATA toll provider's Point of Presence. AT&T, in turn, asserts that both local traffic and AT&T's intraLATA toll traffic, upon request, are appropriately routed on shared transport. AT&T characterizes SWBT's position as an "attempt to retain its residual monopoly power over the intraLATA toll market."⁸¹ Staff suggests that AT&T's proposed language is applicable only where there are existing trunks and lines and that there is no regulatory impediment to SWBT's routing of AT&T's intraLATA toll traffic over such trunks and lines. The M2A addresses this point at Sections 2.4.1, 2.20 and 5.2.1 of Attachment 6—UNEs, which SWBT interprets to permit the routing of AT&T's intraLATA toll traffic over shared transport in cases where AT&T is providing local service to the originating end user via UNEs.

SWBT's witness Bryan Gonterman testified that the routing of intraLATA toll traffic over shared transport, as requested by AT&T, would require customized routing.⁸² Gonterman testified that the shared transport UNE does not include customized routing.⁸³ Gonterman relied on the F.C.C.'s Third Reconsideration Order for the proposition that shared transport "requires a requesting carrier to utilize the routing table contained in the incumbent LEC's switch."⁸⁴ Likewise, SWBT's witness Michael Kirksey testified that, without customized routing, SWBT's switch would deliver the traffic in question directly to the dialing customer's PIC.⁸⁵ In fact, SWBT asserts that this is the appropriate result.⁸⁶

AT&T's witness Scott Finney, in turn, testified that SWBT is required to provide UNEs without the imposition of restrictions and limitations such as this one.⁸⁷

⁸¹ *AT&T's Proposed Findings*, at 36.

⁸² Exhibit 40 at 52-54.

⁸³ *Id.*

⁸⁴ *Id.* at 53. No more detailed citation to the Third Reconsideration Order is provided.

⁸⁵ Exhibit 42 at 5

⁸⁶ *Id.*

⁸⁷ Exhibit 48 at 14-15.

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Finney relied on the F.C.C.'s Local Competition Order, which states that Section 251(c)(3) of the Act "bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend."⁸⁸ Finney denied that DPs 30 and 31 turn on customized routing, as SWBT asserts, but rather on "fundamental issues of parity."⁸⁹ Finney testified that SWBT should route traffic in an identical manner regardless of which carrier provides the local service, that is, that the call path should be similar.⁹⁰

SWBT's witness Gonterman testified that the real issue is an attempt by AT&T to avoid paying exchange access.⁹¹ Normally, when a customer makes a long distance or toll call, the IXC charges the dialing customer and the LECs originating and terminating the call charge the IXC for originating and terminating access.⁹² Gonterman testified that, by requiring that SWBT carry toll traffic on shared transport, AT&T was seeking to avoid the payment of terminating access to SWBT.⁹³ AT&T's witness Finney admitted as much under cross examination.⁹⁴

The Commission will resolve this DP by directing the parties to adopt the position suggested by Staff in its Reply Brief.⁹⁵ SWBT shall carry local traffic on shared transport and also intraLATA toll calls upon request, but only where AT&T provides local service to the end user.

31. How will PICed calls by AT&T customers be routed?

SWBT contends that this DP includes two issues. First, where will SWBT hand off an intraLATA toll call dialed by an AT&T customer to that customer's PIC?⁹⁶ Second, can AT&T require SWBT to provide intraLATA toll service to AT&T's customers by specifying shared transport over Feature Group D?

AT&T proposes that SWBT will route intraLATA toll calls dialed by AT&T's customers to the end user's PIC's Point of Presence (POP) using Feature Group D

⁸⁸ *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (released August 8, 1996) (hereinafter the "Local Competition Order") at Para. 292.

⁸⁹ Exhibit 49 at 19.

⁹⁰ *Id.*

⁹¹ Exhibit 41 at 33-35.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Tr. at 845.

⁹⁵ *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (*Reply Brief of Staff*, filed June 1, 2001) (hereinafter "Staff's Reply Brief") at 5-6.

⁹⁶ PIC is Presubscribed InterLATA Carrier or Presubscribed IntraLATA Carrier as the context demands.

signaling. SWBT agrees that all such intraLATA toll calls will be routed to the end user's PIC for intraLATA toll service, but suggests additional language stating that SWBT is not an authorized PIC for an AT&T customer utilizing unbundled local switching. SWBT points out that toll traffic is delivered to the PIC's Feature Group D trunks at the end office or tandem of the IXC's choice and carried from there by the IXC to its network.⁹⁷ Staff suggests that AT&T's language is appropriate because SWBT's language does not make it clear how such calls will be completed. Staff proposes language which is a hybrid of AT&T's and SWBT's suggestions. The M2A addresses this at Sections 5.2.2.2.1.2 5.2.2.2.1.3 of Appendix—Pricing (UNEs) to Attachment 6—UNEs.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff. Staff's proposed language incorporates wording proposed by both AT&T and SWBT and appropriately makes it clear that SWBT will not provide intraLATA toll to AT&T's customers.

32. Should AT&T's customized routing language be included in the Agreement?

This DP concerns the customized routing of direct dialed, intraLATA Directory Assistance calls dialed from a foreign NPA pursuant to Section 6.4.14 of the UNE Appendix. SWBT contends that AT&T's proposed language extends beyond SWBT's standard dialing arrangements. Such a call should be routed to the end user's PIC like any other toll call.⁹⁸ The UNE Remand Order identifies that the ILEC's current routing tables are to be used in provisioning the customized routing service. SWBT will route Operator Service/Directory Assistance (OS/DA) traffic on a customized basis, but not intraLATA toll traffic.

AT&T contends that this DP represents another attempt by SWBT to improperly impose usage limitations on UNEs.⁹⁹ AT&T also asserts that this issue is, in part, a matter of dialing parity.¹⁰⁰ If a SWBT local service customer can reach Directory Assistance in a foreign NPA by dialing "(NPA) 555-1212" and an AT&T local service customer must dial "1010XXX-(NPA) 555-1212," AT&T is clearly placed at a competitive disadvantage.¹⁰¹ The Act requires LECs to "provide dialing parity to competing providers of telephone exchange service and telephone toll service[.]"¹⁰² Staff agrees that AT&T's language is appropriate.

The M2A addresses customized routing in detail in Sections 5.2.3 and 5.2.4 of Attachment 6—UNEs.

⁹⁷ IXC is interexchange carrier.

⁹⁸ Exhibit 42 at 8-9.

⁹⁹ Exhibit 48 at 12-15.

¹⁰⁰ Exhibit 48 at 27.

¹⁰¹ *Id.*

¹⁰² 47 U.S.C. Section 251(b)(3).

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The Commission will resolve this DP by directing the parties to adopt SWBT's position. The issue appears to be whether a foreign NPA Directory Assistance call is viewed as a toll call or as an OS/DA call. SWBT characterizes such a call as a toll call and AT&T characterizes it as an OS/DA call. The Commission concludes that SWBT's characterization is the more reasonable.

36. Should AT&T be allowed to overflow its traffic to SWBT's shared or common transport?

AT&T proposes, at Section 6.5.9.4.3, language that will permit its dedicated trunk groups with ULS custom routing to overflow to SWBT's shared or common transport. SWBT objects to this arrangement in the absence of any parameters governing the amount of overflow traffic or the duration of the overflow.¹⁰³ SWBT further contends that AT&T is attempting to shift the burden of providing sufficient network capacity to SWBT. AT&T, in turn, argues that this arrangement would not unduly burden SWBT's network and that it would enhance network efficiency.¹⁰⁴ Staff recommended a modified version of AT&T's language, including a caveat that "the overflow does not infringe upon SWBT or its network integrity."¹⁰⁵ The M2A provides at Section 5.2.3.1 of Attachment 6—UNEs that the custom routing of any traffic other than OS/DA be handled as a special request.

The Commission will resolve this DP by directing the parties to adopt the position of SWBT. In the absence of any limitations, the overflow arrangement proposed by AT&T is inappropriate.

37. According to [what] schedule will SWBT implement customized routing for AT&T?

AT&T has proposed inclusion of a schedule for the implementation of customized routing at Sections 6.6.1 and 6.6.2.5. AT&T asserts that this schedule is in use in California and was originally proposed by SBC. SWBT contends that the schedule is unnecessary because SWBT has already provided an implementation schedule in the language relating to OS/DA and that, in the event of any requests for other custom routing through the BFR process, an implementation schedule will be developed. SWBT further suggests that AT&T's language will lead to additional litigation. Staff recommends adoption of SWBT's proposed language. The M2A provides for customized routing at Sections 5.2.3 and 5.2.4 of Attachment 6—UNEs.

The Commission will resolve this DP by directing the parties to adopt SWBT's position. AT&T's suggested implementation schedule is unnecessary.

¹⁰³ Tr. 731-732.

¹⁰⁴ Exhibit 49 at 21.

¹⁰⁵ Exhibit 2-C at 45.

Network Interconnection and Architecture

The Commission will resolve all open issues not identified by AT&T as non-M2A issues by directing the parties to adopt the corresponding provisions of the M2A. With respect to the Network Interconnection and Architecture category, DPs 1, 2, 4, 6, 7, 11, and 13-15 are so resolved. The Commission specifically resolves the DPs identified by AT&T as non-M2A issues as follows:

3. Should [the] financial obligations of interconnection be shared on an equitable basis?

SWBT proposes that each party bear responsibility for approximately half of the financial obligations of interconnection; this position may be characterized as a “50:50 split.” AT&T, in turn, proposes that each party bear all costs on its side of the Point of Interconnection (POI). AT&T suggests that SWBT’s proposal would impose an unfair burden on the party contributing the smaller volume of traffic. The M2A addresses this point in Section 1.2 of Attachment 11—Network Interconnection Architecture. This provision makes each party responsible for all costs on its side of the POI but also requires an interconnection in each SWBT exchange in which a CLEC seeks to offer services.

Staff proposes language drawn from both parties’ proposed language. Under Staff’s proposal, some costs would be shared equally and others would be based on traffic volume. Staff suggests that, for the nonrecurring costs of constructing the interconnection, a 50:50 split is most equitable because both parties, and their customers, will benefit from the interconnection. As to the recurring costs of operating the interconnection, Staff suggests that a traffic volume-based approach is most equitable.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff. Staff has accurately analyzed the equities of the situation and the Commission agrees that separate treatment is required for recurring costs and nonrecurring costs.

5. With respect to jointly provided exchange access service to IXC customers, should the same terms apply to both parties as co-LECs regardless of which party is providing the tandem switching function to the IXC?

SWBT opposes AT&T’s proposed language on the grounds that detailed terms and conditions relating to IXC traffic do not belong in an agreement providing for local competition. SWBT asserts that the traffic AT&T seeks to include is access traffic, properly handled under the access tariff. AT&T contends that its language specifies who is responsible for transporting the IXC traffic regardless of who provided the switching. AT&T believes the IXC should be permitted to choose who will provide the tandem switching function. Staff recommends that AT&T’s language be adopted because it promotes competition, but that additional language be inserted to prohibit the use of AT&T’s proposed arrangement to avoid access charges. The M2A addresses this issue at Section 2.2 of Attachment 11—

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Network Interconnection Architecture. That provision provides for the transport of the traffic at issue over a meet point trunk group distinct from other trunk groups, subject to the terms of applicable access tariffs.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff. The Commission notes that AT&T, in its Proposed Findings, urges the Commission to adopt Staff's suggestion.¹⁰⁶

8. Should AT&T be required to establish direct end-office trunk groups when the usage between itself and other carriers requires 24-voice grade paths (trunks) or more?

9. Should AT&T be required to establish direct end-office trunks when traffic volume requires 24 or more trunks?

20. Should AT&T be required to establish a local trunk group from AT&T's switch to each SWBT end-office in a local exchange area that has no local tandem?

These are closely related DPs. SWBT proposes language at Part C, Sections 5.1, 6.0, 7.0, and 9.2.3, requiring AT&T to construct direct trunk groups when a 24 trunk traffic threshold is reached. SWBT explains that it is willing to allow AT&T reasonable use of SWBT's tandems to exchange traffic with SWBT or with third party carriers, including transit traffic. However, in order to avoid premature exhaustion of SWBT's tandems, SWBT seeks to impose on AT&T the same 24 trunk threshold that it applies to itself. Under this rule, when the traffic in question reaches the 24 trunk threshold, AT&T would be required to construct a direct trunk group that would avoid the tandem altogether. In exchange, SWBT would undertake to accept AT&T's overflow traffic through its tandem.

AT&T objects to SWBT's language, arguing that it essentially allows SWBT to design AT&T's network, it permits SWBT to impose a business plan upon AT&T, it permits SWBT to evade its interconnection obligations under the Act, and that the 24 trunk threshold is too low. AT&T proposes language at Part A, Section 1.0, that asserts AT&T's right to interconnect with SWBT at any technically feasible point. Staff agrees with AT&T. The M2A does not impose a direct trunking obligation upon reaching a 24 trunk threshold, but provides at Section 5.3 of the Interconnection Trunking Requirements Appendix to Attachment 11—Network Interconnection Architecture, that the parties might agree to establish a direct trunk group at that point.

The Commission will resolve these DPs by directing the parties to adopt the positions and language suggested by AT&T. SWBT is obligated to interconnect with AT&T at any technically feasible point, without regard to traffic volume. AT&T is free to design its own network and to capitalize on any competitive advantages conferred by its network architecture in conjunction with SWBT's interconnection

¹⁰⁶ AT&T's Proposed Findings at 61.

duty. The Commission agrees with Staff, as to the proposed direct trunking obligation between AT&T and third party carriers, that this agreement is not able to impose any obligation upon non-party carriers.

10. Should traffic be routed in a manner that is consistent with each party's Local Exchange Routing Guide (LERG) entries?

SWBT proposes that traffic be routed pursuant to the LERG and that traffic on end office trunks should only be for the end office and that the end office should not perform any tandem functions. AT&T agrees that traffic should be routed pursuant to each party's LERG entries and objects to SWBT's proposed language as unnecessary because the parties have already agreed to such language at Attachment 11—Network Interconnection Architecture, Part C, Section 22.0. Staff agrees with SWBT, but would modify SWBT's proposed language by removing multistate references. The M2A at Section 1.1.1 of Attachment 12—Compensation, requires that traffic be routed pursuant to the LERG unless the Commission orders otherwise.

The Commission will resolve this DP by directing the parties to adopt the position and language proposed by Staff. There is no dispute among the parties that the LERG should govern traffic routing. There is also no dispute among the parties that traffic on an end office trunk should be limited to traffic intended for that end office. The only dispute appears to be AT&T's argument that, if SWBT's LERG is properly programmed, then the language concerning the end office trunks is surplusage. The Commission believes that the language, if indeed surplusage, does no harm and is useful in defining the appropriate use of end office trunks.

12. Should AT&T be required to duplicate SWBT's network architecture to provide local exchange?

SWBT has proposed language at Section 15.0 of Part C that would assign responsibility for facilities transporting foreign exchange (FX) traffic. SWBT maintains that AT&T should be responsible for all facilities that carry AT&T's FX traffic. At hearing, SWBT suggested an example in which AT&T assigned a New Madrid NPA NXX code number to a St. Louis customer in order to permit that customer to receive toll free calls from New Madrid callers.¹⁰⁷ SWBT states that, while it does not object to that practice, it wants to ensure that AT&T bears the associated costs. AT&T, in turn, argues that its network architecture is fundamentally different from SWBT's and that SWBT should deliver all traffic destined for the same NPA NXX to the same AT&T switch. AT&T will then transport the traffic to the end user and charge the same reciprocal compensation rate, regardless of the physical location of the customer. Staff recommends adoption of a modified version of SWBT's language. Under the M2A, at Section 1.1 of Attachment 12—Compensation, a call such as described in the example would not be classified as a local call.

¹⁰⁷Tr. 991-996.

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The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff.

16. Is SWBT's language requiring that trunk migration from one-way to two-way or from two-way to one-way be "agreed" appropriate for inclusion in the attachment?

The parties dispute over Section 5.0(c) of Part E is limited to a single word. SWBT contends that the word "agreed" should appear in the section at issue to reflect SWBT's position that migration is not mandatory. AT&T argues that the word "agreed" is inappropriate because it could prevent AT&T from using one way trunks. Staff agrees with AT&T. The M2A, at Section 2.1.1 of Attachment 11—Network Interconnection Architecture, follows the Commission's decision in TO-97-40, which ordered two way trunking where feasible.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by AT&T.

17. Should six months or three months of consecutive under 75 percent call capacity trunk groups be used for [a] resizing threshold?

19. Should the Agreement contain definitions of under- and over-utilization of trunks and facilities, and provide for what will happen if AT&T is unresponsive to SWBT requests for resizing?

These DPs relate to the management of network facilities. Network facilities which are dedicated to a particular purpose, but which are not fully used in that function, represent stranded assets. Efficient network management requires that such stranded assets be recovered and redeployed where they are needed. The first issue concerns how long should the underutilization of a trunk group persist before it is resized? The second concerns the definitions of underutilization and whether SWBT should possess unilateral authority to manage its network if AT&T does not cooperate.¹⁰⁸

With respect to the duration of underutilization before a trunk group is resized, SWBT argues that three months is long enough. SWBT proposes language at Section 3.0, Part F, containing both the 75 percent threshold and the three-month threshold. SWBT's witness Craig Mindell testified, for example, that Local AT&T used less than one-third of its trunk group capacity during its highest use month over the last year.¹⁰⁹ AT&T, on the other hand, believes that three months is too short and that a six-month period is required because many important factors may not manifest in a three-month window. AT&T's witness Dennis Humes testified that the short window proposed by SWBT would likely lead to many unnecessary usage

¹⁰⁸ Despite the wording of DP 19, SWBT's proposed language nowhere states a definition of overutilization.

¹⁰⁹ Exhibit 51 at 27.

studies.¹¹⁰ Staff agrees with AT&T because a CLEC, as a new entrant, should be afforded some latitude in developing business forecasts and plans. The M2A does not set a threshold for resizing.

The Commission will resolve DP 17 by directing the parties to adopt AT&T's position and related language. The Commission agrees with Staff that a new entrant should be afforded some latitude in developing business forecasts and plans. Additionally, as the M2A does not include a resizing threshold, it cannot be as important as SWBT suggests here.

As to the second issue, SWBT proposes to add language to Section 3.0, Part F, that defines underutilization. Additionally, SWBT proposes language at Section 4.0, Part F, that authorizes it to unilaterally resize trunk groups if AT&T does not cooperate. AT&T opposes this language because it does not contain any provisions as to SWBT's failure to cooperate with a CLEC request to resize a trunk group. AT&T also asserts that Section 3.0 contains an adequate definition of underutilization. Staff suggests that part of this DP was resolved under DP 17; as for the rest, Staff opposes SWBT's proposed language at Section 4.0 as contrary to the Act. The M2A, while addressing the underutilization of trunks and facilities at Section 23 of Appendix Network Interconnection Methods, does not grant SWBT unilateral authority to resize trunk groups.

The Commission will resolve DP 19 by directing the parties to adopt AT&T's position. The absence of any unilateral resizing power in the M2A persuades the Commission that SWBT does not need it in this agreement, either. The proposed additional language for Section 3.0 adds nothing useful to that provision.

18. Should SWBT's language requiring that the party requesting a unilateral change from the existing interconnection arrangement to a new interconnection arrangement based on the new interconnection agreement bear the conversion costs for the new arrangement be included in the attachment?

The parties agree that each of them will bear its own costs of converting from the previous interconnection arrangement to the new interconnection arrangement specified by this agreement. However, SWBT proposes additional language, at Section 2.2 of Part B, providing that any party seeking to *unilaterally* change the network architecture from one previously agreed by the parties must bear all conversion costs. SWBT contends that this language prevents the party causing such costs from unfairly imposing some of them on the other party. AT&T objects to SWBT's additional language. AT&T explains that this DP relates to its desire to utilize a one way trunking arrangement under this agreement rather than the two way trunking arrangement used previously. AT&T contends that the additional language sought by SWBT would impose the full cost of conversion on AT&T. AT&T argues that, should the Commission's arbitration decision select AT&T's proposed one way trunking alternative, then it would be appropriate that each party bear its own costs to convert. Staff agrees with AT&T. The M2A does not impose conversion costs on the party seeking to change network architecture.

¹¹⁰ Exhibit 53 at 34.

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The Commission will resolve this DP by directing the parties to adopt the position and language suggested by SWBT. The Commission has resolved the interconnection trunking issue by directing the parties to adopt the corresponding provision of the M2A. That provision requires two way trunking where feasible.

Operations Support Systems (OSS)

With respect to the Operations Support Systems (OSS) category, AT&T identified all of the DPs as non-M2A issues. The Commission resolves these DPs as follows:

1. Should SWBT have the ability to audit AT&T where it believes AT&T is violating Customer Proprietary Network Information (CPNI) protective measures or otherwise misusing SWBT's OSS?

SWBT proposes language granting it the right to audit AT&T's use of CPNI. SWBT asserts that it has a duty under Section 222 of the Act to protect CPNI and that the audit function is necessary to implement that duty. SWBT's witness John Mitchell testified, as an example, that on one occasion, the access of SWBT's OSS by a CLEC in violation of stated line limits resulted in the temporary shut down of the entire system, thus depriving all users of access.¹¹¹ AT&T opposes SWBT's proposed language as overly broad, invasive, and subject to abuse by SWBT. AT&T states that it will comply with all applicable laws and regulations governing the use of CPNI and cooperate with SWBT in the investigation of any claims of misuse. Staff suggests a modified version of SWBT's suggested language, removing all references to non-Missouri SBC entities.

The Commission will resolve this DP by directing the parties to adopt Staff's position and Staff's suggested language. The Act states that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information[.]"¹¹² A reasonable audit right in the event of possible misuse is necessary to protect the integrity of the CPNI. AT&T's witness, Daniel Rhinehart testified that "AT&T recognizes SWBT's obligation to monitor and control how its OSS are used to insure that the systems are properly used and not subject to abuse from any system user."¹¹³

2. (A) (SWBT) Should AT&T be allowed access to CPNI even though it is not and will not be providing local exchange service to the end user?

2. (B) (AT&T) Should AT&T be permitted access to CPNI to support orders for services such as Local Plus or vertical features for resale on a stand alone basis?

¹¹¹ Exhibit 30 at 4. This occurred in a state other than Missouri.

¹¹² 47 U.S.C. Section 222(a).

¹¹³ Exhibit 18 at 68.

3. Should the terms and conditions that afford access to OSS interfaces be clarified to explicitly include access that is required to process orders for telecommunications services such as vertical features or services like Local Plus where AT&T is one of several local service providers to an end user account?

These DPs are closely related. SWBT states that it is only required to permit CLECs to access the CPNI of another carrier's end user when the CLEC has been authorized by the end user to become the local service provider. AT&T, in turn, complains that SWBT's proposed language prohibits AT&T from accessing CPNI for legitimate reasons, such as reselling SWBT's vertical services. Staff evidently sides with AT&T, at least with respect to the resale of stand-alone vertical services.

SWBT points out that, under the M2A's Resale Appendix, which AT&T has adopted in Missouri, a CLEC cannot order vertical services or Local Plus unless the CLEC is the local exchange service provider for the end user in question. SWBT further asserts that AT&T has disguised a resale issue as an OSS issue because, given that resale is not permitted in the circumstances under consideration, there is no need for access to CPNI. AT&T, on the other hand, characterizes these DPs as turning on the issue of non-discriminatory access to CPNI. AT&T argues that SWBT's refusal to permit the resale of vertical features and Local Plus on a stand alone basis constitutes an impermissible resale restriction. AT&T contends that other State commissions have required SWBT to permit the resale of vertical services and Local Plus on a stand-alone basis.

Staff points to a recent decision by this Commission that requires SWBT to provide Local Plus either as a service for resale or as a UNE.¹¹⁴ Staff evidently believes that this decision resolves the issue because it requires SWBT to unbundle Local Plus and, by extension, vertical services.

The Commission will resolve these DPs by directing the parties to adopt SWBT's position and language. The Act further provides that a carrier may "use, disclose, or permit access" to CPNI only in the provision of the service from which the information derives or of some necessary and related service, "[e]xcept as required by law or with the approval of the customer[.]"¹¹⁵ This Commission has never determined that ILECs must permit the stand-alone resale of vertical services and does not do so here. Therefore, the access to CPNI sought by AT&T is not at this time required by law. In any event, AT&T has adopted the M2A's Resale Appendix, under which a CLEC cannot order vertical services or Local Plus unless the CLEC is the local exchange service provider for the end user in question.

¹¹⁴ *In the Matter of the Investigation into the Effective Availability for Resale of Southwestern Bell Telephone Company's Local Plus Service by Interexchange Companies and by Facilities-based Competitive Local Exchange Companies*, Case No. TO-2000-667 (Report and Order, issued May 1, 2001).

¹¹⁵ 47 U.S.C. Section 222(c)(1).

4. Ordering of Enhanced Extended Loops (EELS).

SWBT states that, pursuant to the UNE Remand Order, an EEL is not a UNE. Therefore, SWBT contends that it has no obligation to make EELS available and the language proposed by AT&T for inclusion in the OSS Attachment is not appropriate. Staff agrees that AT&T is attempting to define an EEL as a UNE, contrary to the UNE Remand Order. AT&T responds that the UNE Remand Order does require SWBT to make EELS available under certain conditions and that its proposed language, far from attempting to convert an EEL into a UNE, simply creates an ordering mechanism for EELS. SWBT replies that those limited conditions do not exist and will not exist during the term of this agreement. Staff recommends that SWBT's position be adopted because AT&T has consistently opposed the inclusion of multistate language elsewhere and because the F.C.C. has not defined an EEL as a UNE.¹¹⁶ The M2A contains specific provisions regarding the ordering of EELS at Section 14.7 of Attachment 6—UNEs.

The Commission will resolve this DP by directing the parties to adopt SWBT's position. The Commission sees no need to establish an ordering mechanism for a service that will not, in fact, be ordered.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Arbitration Under the Telecommunications Act of 1996:

The Telecommunications Act of 1996 was enacted by Congress to bring competition to the telecommunications industry and thereby to reap such benefits as lower rates, more efficient service, and a quickened pace of technological innovation.¹¹⁷ Key to the scheme created by the Act are various provisions requiring the incumbent local telephone companies—the ILECs—to share their networks with competitors. Thus every carrier, of whatever type, is required to interconnect, directly or indirectly, with other carriers.¹¹⁸ All local carriers, whether old and entrenched or new and upstart, are obligated to permit competitors to resell their services, to provide number portability and dialing parity, to establish reciprocal compensation arrangements for the transport and termination of traffic, and to allow access to their poles, conduits and rights-of-way.¹¹⁹ Most importantly, the

¹¹⁶ *Staff's Reply Brief* at 7.

¹¹⁷ *Iowa Utilities Bd., et al., v. FCC et al.*, 120 F.3d 753, 791-92 (8th Cir. 1997) (*Iowa Utilities Bd. I*), *aff'd in part, rev'd in part*, 525 U.S. 366 (1999); "Congress sought 'to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.' Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996)."

¹¹⁸ 47 U.S.C. Section 251(a)(1).

¹¹⁹ 47 U.S.C. Section 251(b).

ILECs are required to negotiate “in good faith” and to make agreements with competitors as to interconnection, access to network elements on an unbundled basis (UNEs), and the sale of telecommunications services at wholesale rates for resale by competitors.¹²⁰ Finally, the Act imposes on ILECs, such as SWBT, the duty to provide for such physical collocation of facilities and equipment as is necessary for interconnection or access to UNEs.¹²¹

The Act favors agreements reached voluntarily, by negotiation, and permits these to be made “without regard to the standards set forth in subsections (c) and (d) of section 251.”¹²² Such voluntary agreements must be submitted to the state commission for approval and the state commission may only reject such a voluntary agreement on a finding that it discriminates against a non-party carrier or that its implementation “is not consistent with the public interest, convenience, and necessity[.]”¹²³

Congress recognized, however, that it would not always be possible for competing carriers to reach agreement through voluntary negotiation. Therefore, the Act creates a scheme of compulsory arbitration.¹²⁴ The state commission must resolve each open issue by “imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement[.]”¹²⁵ Arbitrated agreements must also be approved by the state commission, which may reject them if they do not meet the requirements of Section 251 of the Act, or the standards at Section 252(d) of the Act, or the requirements of the F.C.C.’s regulations interpreting and implementing Section 251 of the Act.¹²⁶

Jurisdiction under the Telecommunications Act of 1996

The Commission’s jurisdiction to arbitrate under the Act is conditioned upon proper invocation by the party seeking arbitration.¹²⁷ Therefore, although no party herein disputes that AT&T properly invoked this Commission’s authority to arbitrate, the Commission must nonetheless satisfy itself that it has subject matter jurisdiction.

A party seeking compulsory arbitration must file its petition with the state commission “during the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section[.]”¹²⁸ The parties agree that AT&T requested negotiations on September 14, 2000, and that the interval during which compulsory arbitration could be requested ran from January 27, 2001, through February 21, 2001. Therefore, the Commission concludes that AT&T’s petition for arbitration was timely filed on February 20, 2001.

¹²⁰ 47 U.S.C. Section 251(c), (2), (3) and (4).

¹²¹ 47 U.S.C. Section 251(c)(6).

¹²² 47 U.S.C. Section 252(a)(1).

¹²³ 47 U.S.C. Section 252, (a)(1) and (e), (1) and (2)(A).

¹²⁴ 47 U.S.C. Section 252(b), *passim*.

¹²⁵ 47 U.S.C. Section 252(b)(4)(C).

¹²⁶ 47 U.S.C. Section 252(e), (1) and (2)(B).

¹²⁷ 47 U.S.C. Section 252(b)(1).

¹²⁸ *Id.*

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Additionally, a party seeking compulsory arbitration must, simultaneously with its petition for arbitration, “provide [to] the State commission all relevant documentation concerning (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issues discussed and resolved by the parties.”¹²⁹ Attached to AT&T’s petition were extensive exhibits, including matrices setting out the disputed issues, the parties’ positions on those issues, and AT&T’s proposed successor interconnection agreement, divided into topical attachments. The Commission concludes that AT&T complied with Section 252(b)(2)(A) of the Act.

Finally, a party seeking compulsory arbitration must “provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.”¹³⁰ Attached to AT&T’s petition was a certificate showing service by United States Mail upon SWBT, as well as the General Counsel of the Commission and the Public Counsel, on February 20, 2001, the day on which the petition was filed with the Commission. The Commission concludes that AT&T complied with Section 252(b)(2)(B) of the Act.

Because AT&T complied with all of the Act’s prerequisites for compulsory arbitration by a state commission, the Commission concludes that it is authorized under the Act to arbitrate this dispute.

State Law Jurisdiction

SWBT, as a provider of local exchange and intraLATA long-distance telephone service, is a “telecommunications company” and a “public utility” within the intendments of Section 386.020, (32) and (42), and is therefore subject to the jurisdiction of the Commission under Chapters 386 and 392, RSMo. In the terms of the Act, SWBT is a Bell operating company (BOC) and an incumbent local exchange carrier (ILEC).¹³¹

AT&T, as a provider of intraLATA and interLATA long-distance telephone service, is also a “telecommunications company” and a “public utility” within the intendments of Section 386.020, (32) and (42), and is also therefore subject to the jurisdiction of this Commission pursuant to Chapters 386 and 392, RSMo.

Arbitration Standards

The Act provides:¹³²

In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

¹²⁹47 U.S.C. Section 252(b)(2)(A).

¹³⁰47 U.S.C. Section 252(b)(2)(B).

¹³¹47 U.S.C. Sections 3(4)(A) and 251(h)(1).

¹³²47 U.S.C. Section 252(c), “Standards for Arbitration.”

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Arbitration Procedures:

The Act does not specify any particular procedure for arbitrations by state commissions. This Commission has experimented with different procedural models in the past. The Commission is authorized by its organic law to arbitrate disputes.¹³³ However, that provision also does not specify any particular procedure, other than to require “due notice” and a hearing.¹³⁴ AT&T did not indicate any strong procedural preference in its pleadings, but suggested certain guidelines: that all evidence be taken on the record and that Staff, if used in an advisory capacity, be prohibited from *ex parte* contacts with parties. SWBT, on the other hand, insisted that the proceedings be conducted according to the contested case model. SWBT also suggested that cross examination be time limited.

The FCC Arbitration Procedures

Having considered the arguments of the parties, the Commission on April 5, 2001, adopted for this case the arbitration procedures used by the FCC, 47 C.F.R. Section 51.807 (October 2000), as supplemented by the FCC’s *Public Notice of the Establishment of Procedures for Arbitration of Interconnection Agreements Between Verizon and AT&T, Cox, and WorldCom*, (DA 01-270, Feb. 1, 2001). These procedures were modified to reflect the fact that the petition and response had already been filed in this case, that a prehearing conference had been held, and to incorporate the procedural dates agreed upon by the parties. Because this matter had been pending for some weeks and the petition and response had already been filed, the Commission on April 6, 2001, set a second prehearing conference for April 11 in order to clarify the application of the F.C.C. rules to this proceeding and to provide the parties an opportunity to raise any concerns they might have. No party raised any objection to the procedures adopted by the Commission for this arbitration.

The FCC rules are constructed around the concept of final offer arbitration, also referred to as “baseball” arbitration. In that model, each of the two contending parties must submit its final offer and all supporting evidence for consideration by

¹³³ Section 386.230.

¹³⁴ “[T]he commission ... shall proceed to **hear** such controversy[.]” *Id.* (emphasis added). The applicability of this section to arbitrations under the Act is also open to some question as this section expressly requires the written agreement of all parties to submit the dispute to arbitration. Arbitration under the Act, however, is compulsory.

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the arbitrator. The arbitrator then selects from among the offers submitted by the parties. The Commission modified the FCC's final offer arbitration procedure by requiring that the Commission's Staff participate as a third party as discussed in more detail below. The Commission retained authority to require the parties to submit new final offers if those already submitted were unsatisfactory or to adopt a result not submitted by any party if necessary to reach an agreement consistent with the requirements of the Act.¹³⁵

The Role of the Commission's Staff

Given the highly technical nature of the matters at issue in this case and the Commission's obligation to safeguard and promote the public interest, as opposed to the private interests of the contending carriers who are the parties to this arbitration, the Commission determined that it required access to the neutral technical expertise of its Staff.¹³⁶ Therefore, Staff was required to file Rebuttal Testimony in response to the Direct Testimony filed by the parties.¹³⁷ Staff was also required to file an evaluation of each of the final offers filed by the parties.¹³⁸ In that evaluation, Staff was directed to consider the technical feasibility and public interest impact of each issue contained in each final offer.¹³⁹ Staff was directed to file with its evaluation all necessary supporting material.¹⁴⁰ Finally, to the extent that the public interest so required, Staff was authorized to file a proposed resolution as to any issue within the scope of this arbitration, in the form of a final offer.¹⁴¹ Staff's Evaluation was offered and admitted at hearing as Exhibit 2. No party made any objection to the participation of the Commission's Staff.

The Scope of the Arbitration:

The Arbitration Timeline

In its petition, AT&T stated that it expected the Commission to conduct a two-phase arbitration such as this Commission and certain other state commissions

¹³⁵ *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (*Order Adopting Procedural Schedule*, issued April 5, 2001), Attachment A at Paragraph D(3).

¹³⁶ *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (*Order Adopting Setting Prehearing Conference and Directing Filing*, issued April 5, 2001).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

have conducted in the past.¹⁴² AT&T took the position that, while the arbitration of various non-cost-related issues could be completed by the statutory deadline, the arbitration of the costs of certain UNEs could not realistically be completed within the statutory timeframe, particularly as AT&T expected the development of this issue to require extensive discovery and access to SWBT's own highly confidential costing models. Therefore, AT&T proposed that the Commission arbitrate the non-cost-related issues by the statutory deadline and simply adopt as interim prices UNE prices established in Cases Nos. TO-97-40 and TO-98-115, with final prices to be set after the costs were fully litigated. AT&T relied upon the prior practice of this and other state commissions and certain paragraphs of the FCC's *Local Competition Order*, 11 FCC Rcd. 154999, CC Docket No. 96-98 (released August 8, 1996).

SWBT, in turn, took the position that all issues, including final prices for UNEs, must be resolved by the Commission by the statutory deadline or the Commission would lose jurisdiction. In support of its position, SWBT cited the regulations of the FCC and several federal district court decisions.

On April 5, 2001, having considered the arguments of the parties, the Commission adopted the position urged by SWBT, in view of the express language of the Act providing that the state commission "shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section."¹⁴³

AT&T renewed its objection to this conclusion of the Commission at hearing.

Issues for Determination

The Act expressly limits the issues subject to resolution by the state commission to those framed by the petition for arbitration and the response to the petition.¹⁴⁴ AT&T's petition was accompanied by a matrix showing the disputed issues and the parties' positions on each of them. On March 16, SWBT timely filed its response to AT&T's petition for arbitration.¹⁴⁵ SWBT's response was also accompanied by a matrix showing the disputed issues and the parties' positions on each of them. At the arbitration hearing, the parties jointly tendered a corrected DPL which was admitted without objection as Exhibit 1.

Resolution of Open Issues:

In the procedures adopted by the Commission for this arbitration, Paragraph D(3) provides in part that, "[i]f a final offer submitted by one or more parties fails to comply

¹⁴² By "two phase arbitration," AT&T meant that open cost and price issues would be resolved by the adoption of interim figures by the end of the nine-month statutory deadline, with permanent costs and prices to be adopted following an open-ended litigation likely to extend over many months.

¹⁴³ 47 U.S.C. Section 252(b)(4)(C).

¹⁴⁴ 47 U.S.C. Section 252(b)(4)(A).

¹⁴⁵ 47 U.S.C. Section 252(b)(3) provides that the "non-petitioning party . . . may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition." The Commission received the petition on February 20, 2001, and the 25th day thereafter was Saturday, March 17, 2001. Thus, SWBT's response filed on March 16 was timely.

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with the requirements of this section, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission¹⁴⁶ pursuant to that section."¹⁴⁷ Time does not permit the Commission to direct the parties to submit new final offers. Therefore, the Commission has adopted some results from the M2A, which were not submitted by any party but that are consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the F.C.C. pursuant to that section. The Commission takes this action because of a pervasive inadequacy in the evidence adduced by the parties in support of their positions, perhaps resulting from the strict timeline imposed by the Act.

Costing and Pricing

In resolving by compulsory arbitration the open issues presented to it by the parties, the Commission must establish rates pursuant to the specific requirements of the Act:¹⁴⁸

(d) Pricing standards.—

(1) Interconnection and network element charges.—Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

¹⁴⁶ *I.e.*, the F.C.C.

¹⁴⁷ *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (*Order Adopting Procedural Schedule*, issued April 5, 2001), Attachment A at Paragraph D(3).

¹⁴⁸ 47 U.S.C. Section 252(d).

(2) Charges for transport and termination of traffic.—

(A) In general.—For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction.—This paragraph shall not be construed —

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services.—For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Additionally, the United States Supreme Court has held that rates set by a state commission in a compulsory arbitration under the Act must also comply with the pricing regulations of the F.C.C.¹⁴⁹ These rules provide that “[a]n incumbent LEC’s

¹⁴⁹ *AT&T Corp. et al. v. Iowa Utilities Board et al.*, 525 U.S. 366, 384 85, 119 S.Ct. 721, 732-33, 142 L.Ed.2d 835, ____ (1999).

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rates for each element it offers shall comply with the rate structure rules set forth in Secs. 51.507 and 51.509, and shall be established . . . [p]ursuant to the forward-looking economic cost based pricing methodology set forth in Secs. 51.505 and 51.511[.]”¹⁵⁰ Additionally, the forward-looking economic cost of an element is defined as the sum of its total element long run incremental cost plus a reasonable allocation of forward-looking common costs.¹⁵¹ The TELRIC of an element is “the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC’s provision of other elements.”¹⁵² This is calculated based on a hypothetical network, using the most efficient technology available and the lowest cost network configuration imposed on the LEC’s existing wire centers, and employing forward-looking costs of capital and economic depreciation rates.¹⁵³

The Commission concludes that the rates contained in the M2A, which it has directed the parties to adopt, meet all the requirements of the Act and the regulations of the F.C.C. The Commission further concludes that the other provisions of the M2A, which it has directed the parties to adopt in resolution of the remaining DPs under this topic, also meet all applicable provisions of the Act and the regulations of the F.C.C.

General Terms and Conditions

The Commission concludes that its resolution of the open issues under this category meet all the requirements of the Act and the regulations of the FCC.

Unbundled Network Elements (UNEs) Terms and Conditions

The Act imposes on ILECs¹⁵⁴

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

¹⁵⁰ 47 C.F.R. Section 51.503(b)(1).

¹⁵¹ 47 C.F.R. Section 51.505(a). The total element long-run incremental cost method is referred to by the acronym “TELRIC.”

¹⁵² 47 C.F.R. Section 51.505(b).

¹⁵³ 47 C.F.R. Section 51.505(b), (1)-(3). The Eighth Circuit Court of Appeals invalidated 51.505(b)(1) in *Iowa Utilities Bd. II, Iowa Utilities Bd. v. FCC*, 219 F.3d 744, 751 (8th Cir. 2000), but stayed its mandate pending appeal to the United States Supreme Court.

¹⁵⁴ 47 U.S.C. Section 251(c)(3).

The rules promulgated by the FCC define a “network element” as¹⁵⁵

a facility or equipment used in the provision of a telecommunications service. Such term also includes, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, data-bases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

The FCC’s rules further provide that¹⁵⁶

(a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.

(b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

The Commission concludes that its resolution of the open issues under this category meet all the requirements of the Act and the regulations of the FCC.

Network Interconnection and Architecture

The Act imposes on all carriers a duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]”¹⁵⁷ The Act additionally imposes on ILECs¹⁵⁸

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network -

(A) for the transmission and routing of telephone exchange service and exchange access;

¹⁵⁵ 47 C.F.R. Section 51.5.

¹⁵⁶ 47 C.F.R. Section 51.313, (a) and (b).

¹⁵⁷ 47 U.S.C. Section 251(a)(1).

¹⁵⁸ 47 U.S.C. Section 251(c)(2).

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(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

The Commission concludes that its resolution of the open issues under this category meet all the requirements of the Act and the regulations of the FCC.

Operations Support Systems (OSS)

The FCC rules provide that¹⁵⁹

An incumbent LEC must provide a carrier purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support systems.

The Commission concludes that its resolution of the open issues under this category meet all the requirements of the Act and the regulations of the F.C.C.

IT IS THEREFORE ORDERED:

1. That the motion of Southwestern Bell Telephone Company to exceed the page limitation imposed on the brief is granted.
2. That AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., and Southwestern Bell Telephone Company shall incorporate the Commission's resolution of each open issue as described in this Order into their interconnection agreement and provide a draft of their conformed interconnection agreement to the Staff of the Missouri Public Service Commission within 30 days following the effective date of this Order.
3. That the Staff of the Missouri Public Service Commission shall review the draft conformed interconnection agreement of the parties and determine whether or not the agreement complies with this Order. In the event that Staff determines that the agreement tendered by the parties does not comply with this Order, Staff shall so advise the parties and they shall cooperate with Staff in amending the draft agreement to comply with this Order, modifying language in all sections of the agreement to avoid potentially contradictory provisions.
4. That the parties shall file the conformed interconnection agreement with the Commission for approval upon notification by Staff that the agreement is in compliance with this Order.

¹⁵⁹ 47 C.F.R. Section 51.313(c).

- 5. That Staff shall file a Memorandum advising the Commission that it has reviewed the agreement and determined that it complies with this Order no later than the seventh day following the filing of the agreement with the Commission. The Staff shall further advise the Commission in its Memorandum whether or not the Commission should reject the agreement pursuant to 47 U.S.C. Section 252(e)(2)(B).
- 6. That this Arbitration Order shall become effective on June 14, 2001.

Lumpe, Ch., Murray, Simmons, and Gaw, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 2000.

In the Matter of Billing Credits Issued by Atmos Energy Corporation to Correct Over-billings Related to the Implementation of Revised Rates Pursuant to the Purchased Gas Adjustment Clause.

*Case No. GO-2001-541
Decided June 7, 2001*

Gas §18. The Commission approved the parties' stipulation and agreement. The Commission allowed Atmos to recalculate customer bills and give customers credits to resolve concerns regarding alleged billing errors.

Gas §29. The Commission allowed Atmos not to calculate interest on the portion of its Deferred Carrying Cost Balance related to the total amount of the customer credits made to resolve the billing dispute. To the extent that the agreement conflicts with Atmos' tariffs, the Commission authorized a one-time, limited variance from the tariffs.

Gas §29. The Commission allowed Atmos not to try to recover expenses incurred to correct alleged past billing errors. Atmos, however, may try to recover expenses incurred to prevent future billing errors.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

On April 10, 2001, the Office of the Public Counsel, the Staff of the Missouri Public Service Commission, and Atmos Energy Corporation filed a Unanimous Stipulation and Agreement for the Commission's approval. The Stipulation and Agreement states that it resolves concerns regarding alleged billing errors. As a result of concerns that Staff and Public Counsel had relating to the proration of customer bills for customers in the service area formerly served by Associated Natural Gas Company (ANG), for United Cities Gas Company customers, and for Greeley Gas Company customers, Atmos agreed to recalculate customer bills and give customer credits to resolve concerns regarding alleged billing errors. The Agreement states that credits were issued for customers served under the tariffs of United Cities Gas Company (UCG) in the March billing cycle and that credits will be issued in the May billing cycle for customers in the Greeley division and for those Atmos customers in the service area formerly operated by ANG.

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As part of the Stipulation and Agreement, Atmos agrees to prorate any future changes in the PGA rates in the service area formerly operated by ANG, as specified in the ANG tariffs adopted by Atmos. Atmos also agreed to bill its customers served under the UCG and Greeley tariffs using the new effective rates only when all service being billed a customer contains service taken after the effective date of the new rates, as specified in the tariffs of the UCG and Greeley Divisions.

Atmos also agreed that it will not calculate interest on the portion of its Deferred Carrying Cost Balance (DCCB) related to the total amount of the total customer credits made to customers to resolve the alleged billing errors in this proceeding. The parties agreed that, to the extent that this agreement varies from tariff provisions which require that interest be calculated on the DCCB, the parties will ask the Commission to grant approval of this Stipulation and Agreement as a one time, limited variance from the provisions of Atmos' various tariffs which require that interest be calculated on the full amount of DCCB in the Actual Cost Adjustment proceedings. Atmos has also agreed to continue reviewing billings and issuing bill credits to customers for over-billings that have not already been corrected. Atmos agreed to examine Purchased Gas Adjustment/cost of gas charges from June 1, 2000 through present. Atmos also agreed not to seek recovery in its rates for expenses it has incurred to correct alleged past billing errors through the provision of these bill credits and information to customers but shall be permitted to seek recovery in rates of the cost it has incurred to prevent future recurrence of such errors, including reprogramming of its billing system and the addition of meter reading resources and customers service representatives.

In addition, the Agreement states that Atmos has agreed to make a cash contribution of \$150,000 to various community action agencies throughout its Missouri service areas, for the specific purpose of assisting natural gas customers in Atmos' Missouri service territory who have difficulty paying their gas bills. The parties have agreed that the cash contribution shall be distributed as set forth in Attachment No. 1 to the Unanimous Stipulation and Agreement. On April 19, 2001, Atmos filed a Revised Attachment No. 1, and no objection was received. The parties agreed that the contributions shall be made within two weeks after the effective date of the order approving this Stipulation and Agreement. Further, the parties agreed that copies of the checks and transmittal letters distributing these funds shall be sent to Staff and Public Counsel.

For their part, Public Counsel and Staff agreed not to initiate, support or otherwise assist in complaints or petitions seeking penalties against or damages from Atmos or any of its divisions before the Commission, the courts or any other body regarding billing or meter reading issues arising out of these same facts, events and circumstances occurring prior to March 1, 2001, unless so ordered by the Commission, except as required by the Sunshine Law (Chapter 610).

On May 29, 2001, Staff filed its suggestions in support of the Unanimous Stipulation and Agreement. Staff stated that it believes that the Agreement represents a favorable resolution of the billing problems for customers and recommends that the Commission approve the Agreement. Staff noted that Greeley and UCG have already corrected the billing process to ensure that the customers are not incorrectly billed new PGA rates before the new rates become

effective. Staff stated that most of the customer credits to correct the erroneous billings have already been distributed to the customers in the UCG service territory and that those customer credits were estimated to be \$2.2 million.

Staff noted that customer credits to Atmos' customers were expected to be distributed in the May billing cycle and the total customer credit amount is expected to be several million dollars. Staff also noted that Atmos' billing system is being upgraded at this time. Staff stated that the per-customer credits to Atmos customers will be smaller than those received by Greeley and UCG customers because the proration method results in a smaller PGA rates differential. Staff stated, in summary, that Atmos, Greeley, and UCG have agreed to bill customers per their commission-approved tariff language and correct the associated billing systems; determine customer credits as a result of billing errors; transmit these customer credits to customers that can be located, that are due more than \$5; contribute funds to low income assistance agencies; to waive interest on related DCCB balances; and not seek recovery of certain expenses incurred to correct these billing errors. Therefore, Staff recommends that the Commission approve the Unanimous Stipulation and Agreement.

Pursuant to Section 536.060, RSMo 2000, the Commission accepts the Unanimous Stipulation and Agreement as resolution of the issues in this case. The Commission has reviewed the Unanimous Stipulation and Agreement and finds it to be reasonable and, therefore, the Commission will approve the Unanimous Stipulation and Agreement. The Commission also finds that it is reasonable to grant a one-time, limited variance of Atmos' various tariff provisions which require that interest be calculated on the full amount of DCCB in the Actual Cost Adjustment proceedings, to the extent that this agreement varies from tariff provisions, and will grant such a variance.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on April 10, 2001, by the parties, Attachment A to this order, is approved.
2. That Atmos Energy Corporation shall issue the bill credits as agreed and make the cash contribution of \$150,000 to the community action agencies as set forth in the Unanimous Stipulation and Agreement.
3. That, to the extent that this agreement varies from Atmos Energy Corporation, United Cities Gas Company and Greeley Gas Company tariff provisions, a one time, limited variance from the provisions of the various tariffs which require that interest be calculated on the full amount of DCCB in the Actual Cost Adjustment proceedings, is granted.
4. That this order shall become effective on June 17, 2001.
5. That this case may be closed after June 18, 2001.

Lumpe, Ch., Murray, Simmons, and Gaw, CC., concur.

S. Register, Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

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In the Matter of the Application of UtiliCorp United Inc. under §32(k) of the Public Utilities Holding Company Act of 1935 Concerning Service Agreement No. 2 Between MEP Pleasant Hill, L.L.C. and UtiliCorp United Inc. d/b/a Missouri Public Service.

*Case No. EO-2001-477
Decided June 7, 2001*

Electric §1. The Commission granted UtiliCorp United Inc., d/b/a Missouri Public Service, a variance for good cause from the affiliate transactions rule as set forth in Commission Rule 4 CSR 240-20.015(2)(A)(1). The company requested the variance for the purpose of performing in accordance with the Service Agreement No. 2 with MEP Pleasant Hill, L.L.C.

Electric §14. The Commission granted UtiliCorp United Inc., d/b/a Missouri Public Service, a variance for good cause from the affiliate transactions rule as set forth in Commission Rule 4 CSR 240-20.015(2)(A)(1), for the purpose of performing in accordance with its Service Agreement No. 2 with MEP Pleasant Hill, L.L.C.

ORDER GRANTING VARIANCE

This order grants the motion filed on May 18, 2001, by UtiliCorp United, Inc., d/b/a Missouri Public Service, with the Missouri Public Service Commission for variance concerning Service Agreement No. 2 (SA2).

UtiliCorp's Original Application

UtiliCorp filed an application on March 8, 2001, for an order concerning SA2 between UtiliCorp and MEP Pleasant Hill, L.L.C. (Pleasant Hill). UtiliCorp stated that it filed the application under Subsection 32(k) of the Public Utility Holding Company Act of 1935 (the PUHCA), and Commission Rules 4 CSR 240-2.060(1) and 4 CSR 240-2.080.

UtiliCorp stated that it is a Delaware corporation, in good standing, with its principal office in Kansas City, Missouri, authorized to conduct business in Missouri through its Missouri Public Service operating division. UtiliCorp provides electric and natural gas in its service areas subject to the jurisdiction of the Commission. A certified copy of UtiliCorp's Certificate of Corporate Good Standing Foreign Corporation and fictitious name registration issued by the Missouri Secretary of State was filed in case number EM-2000-292 and was incorporated by UtiliCorp's reference to it under Commission Rule 4 CSR 240-2.060(1)(G). UtiliCorp stated that it has no pending action or final unsatisfied judgments or decisions against it from any state or federal agency or court which involve customer service or rates. UtiliCorp also stated that it has no annual report or assessment fees that are overdue.

Briefly restated, UtiliCorp's application further pointed out:

- Pleasant Hill is a special purpose limited liability company organized under the laws of the State of Delaware, and is in good

standing. Pleasant Hill is owned equally by Aquila Energy Corporation--a wholly owned subsidiary of UtiliCorp--and Calpine Corporation. Pleasant Hill is constructing an approximately 600 MW gas fired, combined cycle power project in Cass County, Missouri (the Aries Project).

- UtiliCorp has entered into contracts under which it purchases wholesale electric power. On May 22, 1998, UtiliCorp entered into a competitive bidding process under which it issued a Request for Proposal (RFP), for both annual and seasonal purchased power capacity.
- Pleasant Hill submitted the lowest bid. Accordingly, UtiliCorp negotiated a Power Sales Agreement (PSA) with Pleasant Hill.
- Subsection 32(k) of the PUHCA prohibits an electric utility, such as UtiliCorp, from entering into a purchase power agreement with an affiliated exempt wholesale generator (EWG), unless every state commission having jurisdiction over the retail rates of the electric utility makes determinations with respect to the agreement; namely, the Commission has sufficient regulatory authority, resources, and access to books and records of UtiliCorp and any relevant affiliate or subsidiary to determine that the proposed PSA (1) will benefit consumers; (2) does not violate any applicable state law; (3) would not provide Pleasant Hill any unfair competitive advantage by virtue of its affiliation with UtiliCorp; and (4) is in the public interest.
- The Commission reviewed the PSA between UtiliCorp and Pleasant Hill in Commission case number EM-99-369 and made the necessary findings to satisfy the PUHCA.
- Thereafter, Pleasant Hill filed with the Federal Energy Regulatory Commission (FERC) a request for certification as an EWG and a request for approval of the PSA under applicable provisions of the PUHCA and the Federal Power Act. After obtaining the FERC approvals, Pleasant Hill began constructing a combined cycle combustion turbine generation plant in Cass County, Missouri, near the town of Pleasant Hill.
- Pleasant Hill is now ready to test the Aries Project. Delivery obligations under the PSA commence on the initial Commercial Operation Date (COD) of the Aries Project in simple-cycle mode and the PSA does not provide for sales of test energy from the project prior to the COD. In order to account for test energy, Pleasant Hill and UtiliCorp have agreed to SA2 (attached to the application as Appendix 1). SA2 also provides for sales of test energy prior to the subsequent COD of the Aries Project in combined-cycle mode. SA2 provides for the sale by Pleasant Hill to UtiliCorp of test energy from the Aries Project at UtiliCorp's

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avoided cost of supply. To remove any possibility of affiliate abuse, the rate is capped at a daily index price plus transmission charges.

- The Commission's statutory authority over retail rates of electrical corporations has not changed since case number EM-99-369. Thus, the Commission continues to have the ability to make the determinations required by the PUHCA.
- SA2 will allow the energy produced during the test of the Aries Project to be beneficially used and enable the Aries Project to produce a steady, affordable, and reliable source of electric power.
- SA2 does not violate any applicable state law.
- SA2 will not provide Pleasant Hill with any unfair competitive advantage by virtue of its affiliation with UtiliCorp.
- UtiliCorp further specifically agrees to the following conditions which are a part of the Commission's Order in case number EM-99-369:
 - a) That UtiliCorp will make available to the Commission, the Commission's Staff, and the Office of the Public Counsel, at reasonable times and reasonable places, all books, records, employees, and officers of Pleasant Hill and any affiliate or subsidiary of UtiliCorp engaged in any activity with Pleasant Hill;
 - b) Pleasant Hill will employ accounting and other procedures and controls related to cost allocations and transfer pricing to ensure and facilitate full review by the Commission and its Staff and to protect against cross-subsidization of non-UtiliCorp business by UtiliCorp's customers; and,
 - c) This order is not binding on the Commission or any party regarding a future rate or earnings complaint case to contest the ratemaking treatment to be afforded SA2. UtiliCorp will not seek to overturn, reverse, set aside, change or enjoin, whether through appeal or the initiation or maintenance of any action in any forum, a decision or order of the Commission which pertains to recovery, disallowance, deferral, or ratemaking treatment of any expense, charge, cost, or allocation incurred or accrued by Pleasant Hill or UtiliCorp as a result of SA2 on the basis that the expense, charge, cost, or allocation has itself been filed with or approved by the FERC, or was incurred under SA2.
- The terms of SA2 are in the public interest.

Staff's Recommendation

On April 27, 2001, the Staff filed its recommendation. Briefly restated, Staff's position is:

- Under SA2, the rate to UtiliCorp for the sale of test energy is set at UtiliCorp's avoided cost of supply (the cost to produce or that otherwise would be incurred for electric power that is displaced because the increment of power is provided by the SA2) and the rate is capped at a market proxy plus applicable transmission charges.
- SA2 defines the terms "Contract Price" and "Buyer's Avoided Cost of Supply":

Contract Price: Buyer's Avoided Cost of Supply (defined below); provided, however, that the Contract Price will in no event exceed the "Into Cinergy" daily index price as quoted by Power Markets Weekly, plus the applicable transmission charges required to deliver the Product to the [UtiliCorp] Control Area.

Buyer's Avoided Cost of Supply: The cost that Buyer would otherwise incur to obtain the similar Energy for delivery to its native load. In situations in which the Buyer's native load offtake is less than the Buyer's available and reducible generation capacity, the avoided cost would be equal to the Buyer's marginal cost of generation. In situations in which the Buyer's native load offtake exceeds Buyer's available generation capacity, the avoided cost would be Buyer's cost to purchase substitute Energy on the open market. In situations where Energy being purchased on the open market can not [sic] be reduced and Buyer's generating units cannot be reduced, the avoided cost will be equal to the proceeds obtained by the Buyer from reselling the Seller's Energy into the existing market and the price received for such energy. The avoided costs will be calculated by the Buyer, and subject to audit and verification by the Seller.

- Commission Rule 4 CSR 240-20.015(2)(A)(1) Affiliate Transactions provides:

A regulated electrical corporation must not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated electrical corporation will be deemed to provide a financial advantage to an affiliated entity if [...] it compensates an affiliated entity for goods or services above the lesser of [...] the fair market price; or [t]he fully distributed cost to the regulated

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electrical corporation to provide the goods or services for itself....

- The "Contract Price" of the SA2 is not in compliance with Commission Rule 4 CSR 240-20.015(2)(A)(1). Missouri courts have held that duly promulgated rules of a state administrative agency have the force and effect of law.

Therefore, in Staff's opinion, this transaction: does not comply with Commission Rule 4 CSR 240-20.015(2)(A)(1); violates state law; will not benefit consumers; and will not be in the public interest. Staff recommends providing UtiliCorp with the PUHCA Subsection 32(k) determinations if UtiliCorp (a) files for a variance from Commission Rule 4 CSR 240-20.015(2)(A)(1), under 4 CSR 240-20.015(10) respecting "Variances," and (b) agrees that (i) this case will not be utilized by UtiliCorp for ratemaking purposes, (ii) the Staff's recommendation respecting this matter and the Commission's Order making the requested PUHCA Subsection 32(k) determinations will not be cited as precedent for any matter, and (iii) UtiliCorp will provide to the Staff access to the books and records and personnel necessary for the Staff to determine the fully distributed cost of SA2.

UtiliCorp's Response

On May 7, 2001, UtiliCorp filed its response to Staff's recommendation. Briefly restated, UtiliCorp's response noted:

- The approach by the Staff is generally acceptable to UtiliCorp, with certain reservations.
- UtiliCorp agrees that: this case will not be utilized by UtiliCorp for ratemaking purposes; the Staff's recommendation respecting this matter and the Commission's Order making the PUHCA Subsection 32(k) determinations will not be cited as precedent for any matter, except for those specific matters for which the application has been filed; and UtiliCorp will provide to the Staff access to the books and records and personnel necessary for the Staff to determine the fully distributed cost of SA2.
- UtiliCorp also agrees to file a motion for the identified variance within this case. UtiliCorp's actions in doing so, however, should not be interpreted as a concession on the part of UtiliCorp that the "contract price" provided for in SA2 is necessarily not in compliance with Commission Rule 4 CSR 240-20.015(2)(A)(1) respecting affiliate transactions or that the price contained in SA2 is necessarily within the jurisdiction of a state commission, rather than the FERC.

· Staff correctly cites Commission Rule 4 CSR 240-20.015. Contrary to Staff's assertions, there likewise is no requirement that contractual terms such as the COD be defined consistent with terms contained in the Missouri Revised Statutes (i.e., "in service" date). This Rule does not impose a requirement to use specific contract language. It merely imposes a test for the resulting compensation paid to the affiliate. Staff's allegation that the contract will not be in compliance with Commission Rule 4 CSR 240-20.015(2)(A)(1) is merely speculation. Compliance, or noncompliance, will ultimately be measured by comparing the actual amount paid, on the one hand, to the lower of fair market price and fully distributed cost, as defined by the Rule, on the other hand.

· SA2 provides for a contract price that will be the lower of UtiliCorp's "avoided cost," as defined by the contract, and a market price. UtiliCorp believes that the "avoided cost" identified by the contract will in fact be lower than the Commission's "fully distributed cost" and therefore complies with Commission Rule 2 CSR 240-20.015(2)(A)(1). UtiliCorp committed in its application that "Pleasant Hill will employ accounting and other procedures and controls related to cost allocations and transfer pricing to ensure and facilitate full review by the Commission and its Staff and to protect against cross subsidization of [non UtiliCorp] business by [UtiliCorp's] customers."

· To the extent it may be in error, UtiliCorp will ask for a variance as suggested by the Staff. The Staff has stated that "the costs associated with SA2 are not considered by the Staff to be material." UtiliCorp agrees with this statement and believes that the added benefit of fully testing the Aries Project so that this power can be added to UtiliCorp's portfolio to the benefit of UtiliCorp's customers and the State of Missouri weighs in favor of the variance suggested by the Staff. SA2 will allow the energy produced during the test of the Aries Project to be used in a beneficial manner and enable the Aries Project to move toward the production of a steady, affordable, and reliable source of electric power for distribution by UtiliCorp to its electric utility customers.

Thus, UtiliCorp stated its intention to file a variance as suggested by the Staff Recommendation, with the reservations identified above.

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UtiliCorp's Motion for Variance

On May 18, 2001, UtiliCorp filed its motion for variance concerning SA2. Briefly restated, the motion noted:

- SA2 provides for a contract price that will be the lower of UtiliCorp's "avoided cost," as defined by the contract, and a market price. UtiliCorp believes that the "avoided cost" identified by the contract will in fact be lower than the Commission's "fully distributed cost" and therefore within the parameters of Commission Rule 2 CSR 240-20.015(2)(A)(1).
- UtiliCorp, however, recognizes the Staff's concerns and, therefore, to the extent that it is in error and the eventual contract price is not in accordance with Commission Rule 2 CSR 240-20.015(2)(A)(1), seeks by its motion a variance from the identified pricing provision for the sole purpose of performing in accordance with SA2.
- The Staff has stated that "the costs associated with SA2 are not considered by the Staff to be material." UtiliCorp agrees with this statement and believes that the added benefit of fully testing the Aries Project so that this power can be added to UtiliCorp's portfolio to the benefit of UtiliCorp's customers and the State of Missouri weighs in favor of the variance suggested by the Staff. SA2 will allow the energy produced during the test of the Aries Project to be used in a beneficial manner and enable the Aries Project to move toward the production of a steady, affordable, and reliable source of electric power for distribution by UtiliCorp to its electric utility customers. Therefore, good cause exists for the grant of the requested variance.

Thus, UtiliCorp requested a Commission order:

- (a) granting a variance for good cause from Commission Rule 4 CSR 240-20.015(2)(A)(1) for the sole purpose of performing in accordance with SA2;
- (b) specifically determining that the Commission has sufficient regulatory authority, resources, and access to books and records of UtiliCorp and Pleasant Hill to exercise its duties under Subsection 32(k) of the PUHCA to ensure that the proposed SA2 (i) benefits consumers, (ii) does not violate any state law, (iii) does not provide Pleasant Hill with any unfair competitive advantage by virtue of its affiliation with UtiliCorp, and (iv) is in the public interest;

(c) authorizing UtiliCorp to perform in accordance with the terms and conditions of SA2 between Pleasant Hill and UtiliCorp; and

(d) authorizing UtiliCorp to enter into, execute, and perform in accordance with the terms of all documents reasonably necessary and incidental to the performance of the transactions which are the subject of SA2.

No party filed a response to UtiliCorp's motion. The Commission will grant the motion.

Findings of Fact

Commission Rule 4 CSR 240-2.060(14) states, in part:

[A]pplications for variances or waivers from...tariff provisions...shall contain information as follows: (A) Specific indication of the...tariff from which the variance or waiver is sought; (B) The reasons for the proposed variance or waiver and a complete justification setting out the good cause for granting the variance or waiver; and (C) The name of any public utility affected by the variance or waiver.

The Commission finds that UtiliCorp has substantially complied with that part of Commission Rule 4 CSR 240-2.060(14) cited above and will grant the variance.

Good Cause Finding

The Commission further finds that the good cause for granting the variance is that the proposed SA2 (i) benefits consumers, (ii) does not violate any state law, (iii) does not provide Pleasant Hill with any unfair competitive advantage by virtue of its affiliation with UtiliCorp, and (iv) is in the public interest.

Findings Required Under the PUHCA

The Commission also specifically finds that it has sufficient regulatory authority, resources and access to books and records of UtiliCorp and Pleasant Hill to exercise its duties under Subsection 32(k) of the PUHCA to ensure that the proposed SA2 (i) benefits consumers, (ii) does not violate any state law, (iii) does not provide Pleasant Hill with any unfair competitive advantage by virtue of its affiliation with UtiliCorp and (iv) is in the public interest.

IT IS THEREFORE ORDERED:

1. That, in compliance with Subsection 32(k) of the Public Utility Holding Company Act of 1935, the Missouri Public Service Commission determines that: it has sufficient regulatory authority, resources, and access to books and records of UtiliCorp United, Inc., d/b/a Missouri Public Service, and MEP Pleasant Hill, L.L.C., to exercise its duties to ensure that the proposed Service Agreement No. 2 (i) benefits consumers, (ii) does not violate any state law, (iii) does not provide MEP Pleasant Hill, L.L.C., with any unfair competitive advantage by virtue of its affiliation with UtiliCorp United, Inc., d/b/a Missouri Public Service, and (iv) is in the public interest.

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2. The Missouri Public Service Commission grants to UtiliCorp United, Inc., d/b/a Missouri Public Service, a variance for good cause from the affiliate transactions rule as set forth in Commission Rule 4 CSR 240 20.015(2)(A)(1) for the purpose of performing in accordance with the Service Agreement No. 2 between MEP Pleasant Hill, L.L.C., and UtiliCorp United, Inc., d/b/a Missouri Public Service.

3. That UtiliCorp United, Inc., d/b/a Missouri Public Service, is authorized to perform in accordance with the terms and conditions of the Service Agreement No. 2 between MEP Pleasant Hill, L.L.C., and UtiliCorp United, Inc., d/b/a Missouri Public Service.

4. That UtiliCorp United, Inc., d/b/a Missouri Public Service, is authorized to enter into, execute, and perform in accordance with the terms of all documents reasonably necessary to the performance of the Service Agreement No. 2 between MEP Pleasant Hill, L.L.C., and UtiliCorp United, Inc., d/b/a Missouri Public Service.

5. That the Commission approves the agreement of the parties expressed in their pleadings that (i) this case will not be utilized by UtiliCorp United, Inc., d/b/a Missouri Public Service, for ratemaking purposes, (ii) no part of this case will be cited as precedent for any matter, and (iii) UtiliCorp United, Inc., d/b/a Missouri Public Service, will provide to the Staff of the Missouri Public Service Commission access to the books and records and personnel necessary for the Staff to determine the fully distributed cost of Service Agreement No. 2.

6. That nothing in this order may be considered a finding by the Missouri Public Service Commission of the value for ratemaking purposes of the properties, transactions, or expenditures herein involved.

7. That the Missouri Public Service Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions, or expenditures herein involved in a later proceeding.

8. That this order shall become effective on June 17, 2001.

Lumpe, Ch., Murray, Simmons, and Gaw, CC., concur.

Ruth, Regulatory Law Judge

In the Matter of Union Electric Company’s Tariff Designed to Increase Rates for Gas Service in the Company’s Missouri Service Area.

*Case No. GR-97-393
Decided June 7, 2001*

Gas §§2, 17, 22, 33. The Commission re-opened this proceeding for the limited purpose of directing the disposition of the excess funds collected during AmerenUE’s pilot weatherization program, and ordered AmerenUE to pay such excess funds to social service agencies to fund additional weatherization work.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

This order approves the stipulation filed by the parties.

Brief Procedural History

On May 16, 2001, Union Electric Company d/b/a AmerenUE, the Missouri Public Service Commission Staff, and the Office of the Public Counsel filed their joint motion requesting the Commission to issue an order re-opening this proceeding for the limited purpose of directing the disposition of the excess funds collected during AmerenUE’s pilot weatherization program, and that it order AmerenUE to pay such excess funds to social service agencies to fund additional weatherization work as set forth in the motion. On May 23, 2001, the Commission granted the motion to re-open and ordered the case re-opened for the limited purpose of directing the disposition of excess weatherization funds. In addition, the Commission established a prehearing conference for June 5, 2001.

Stipulation and Agreement

On June 4, 2001, the parties filed their joint motion for summary disposition. Since all the parties signed both the motion to re-open and the summary disposition motion, and no party has requested a hearing, the Commission treats the pleadings taken as a whole as a proposed unanimous stipulation and agreement.¹ Briefly restated, the summary disposition motion alleged:

- The parties are moving the Commission to summarily order the actions requested by the parties in their motion to re-open.

¹ See Commission Rule 4 CSR 240 2.115.

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- The parties do not believe that there are any disputed facts or any disputed issues of law.
- The parties believe that the Commission may order disposition of the remaining funds consistent with the motion to re-open without the need for any additional proceedings.
- The disposition of the remaining weatherization funds is consistent with the Commission’s authorization in this case, and with the administration of the continuing AmerenUE weatherization program.
- The parties believe that additional proceedings will not be productive for the Commission or the parties.
- Summary disposition will permit the application of the remaining funds to their intended purpose at the earliest possible time.

Thus, the parties requested that the Commission cancel the prehearing conference and procedural schedule ordered in this case, and order the remaining funds to be distributed to the agencies listed in the motion to re-open. (The Commission notes that a notice canceling the prehearing conference was issued on June 4, 2001.)

In the motion to re-open, the parties stated:

The parties agree that the excess funds should be paid to social service agencies to perform additional weatherization work for low income customers in AmerenUE’s gas service territory. Specifically, the parties agree that the funds should be distributed to the four social service agencies which are currently receiving weatherization funds from AmerenUE pursuant to the new weatherization program approved by the Commission in AmerenUE’s most recent rate case—Case No GR-2000-512. Pursuant to the agreement of the parties, the following social service agencies are currently receiving weatherization funds from AmerenUE allocated as follows:

Agency	Allocation
Northeast Community Action Corporation	24%
East Missouri Action Agency	20%
Central Missouri Human Development Corp.	43%
Delta Area Economic Opportunity Council	13%

The Missouri counties served by each of these agencies are set forth on Exhibit A, attached [to the motion]. The parties have agreed that the excess funds from the pilot weatherization program conducted in this proceeding should be allocated to these agencies based on the above-stated percentages.

The Commission requires that each pleading cite the authority under which the pleading is being filed. Commission Rule 4 CSR 240-2.080(3) requires that “[e]ach pleading shall include a...specific reference to the statutory provision or other authority under which relief is requested.”

Neither of the parties’ motions complied with Commission Rule 4 CSR 240-2.080(3) because neither included a specific reference to the statutory provision or other authority under which relief was requested.

The parties should have filed both of their motions under Section 536.060, RSMo 2000, which is discussed below. Further, the parties are admonished to follow the Commission’s rules of practice and procedure in future cases.

Findings and Decision

There is no need for a hearing since no party requested a hearing. The requirement for a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. The *Deffenderfer* case held that if no party requests a hearing, the Commission may determine that a hearing is not necessary and that the Commission may make a decision based on the stipulation.²

The Commission concludes that all issues were settled by the stipulation. The Commission has the legal authority to accept a stipulation offered by the parties as a resolution of issues raised in a case. Section 536.060, which allows parties to dispose of cases by stipulation with summary action that waives procedural requirements, states:

Contested cases...may be informally resolved by consent agreement or agreed settlement or may be resolved by stipulation, consent order, or default, or by agreed settlement where such settlement is permitted by law. Nothing contained in sections 536.060 to 536.095 shall be construed...to prevent the waiver by the parties (including, in a proper case, the agency) of procedural requirements which would otherwise be necessary before final decision, or...to prevent stipulations or agreements among the parties (including, in a proper case, the agency).

The Commission will grant the summary disposition motion and will also grant the relief requested in the motion to re-open.

² See *State ex rel. Deffenderfer Enterprises, Inc. v. P.S.C.*, 776 S.W.2d 494, 496 (Mo. App. 1989).

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IT IS THEREFORE ORDERED:

1. That the Missouri Public Service Commission approves the stipulation and agreement as evidenced by the pleadings of the parties taken as a whole.
2. That Union Electric Company d/b/a AmerenUE must pay the excess weatherization funds to social service agencies to fund additional weatherization work as set forth above in this order.
3. That this order shall become effective on June 17, 2001.

Lumpe, Ch., Murray, Simmons, and Gaw, CC., concur.

Hopkins, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

**In the Matter of Southwestern Bell Telephone Company's
Proposed Tariff PSC Mo. No. 42 Local Access Service
Tariff, Regarding Physical and Virtual Collocation.**

*Case No. TT-2001-298
Decided June 7, 2001*

Telecommunications § 14. The Commission determined it should set rates according to the Joint Sponsors' Model rather than the SBC Model. The Joint Sponsors' Model accounts for all necessary rate elements. It is also self-contained, uses a Microsoft Excel application, and is not confidential. In contrast, the SBC model is not self-contained, is considered highly confidential, has no instruction manual, and does not provide its calculations.

Telecommunications § 37. The Commission approved the Joint Sponsors' Model, which covered caged physical, shared, cageless, adjacent on-site, adjacent off-site and virtual collocation. The Joint Sponsors' Model accounts for all necessary rate elements. It is also self-contained, uses a Microsoft Excel application, and is not confidential. In contrast, the SBC model is not self-contained, is considered highly confidential, has no instruction manual, and does not provide its calculations.

Service § 46. The Commission approved the Joint Sponsors' Model, which covered caged physical, shared, cageless, adjacent on-site, adjacent off-site and virtual collocation.

REPORT AND ORDER

Findings of Fact

On October 24, 2000, Southwestern Bell Telephone Company (SWBT) filed tariff sheets containing the rates, terms, and conditions under which SWBT

proposes to offer physical and virtual collocation. The tariff sheets bear an effective date of November 23, 2000, and have been suspended until September 23, 2001.

On March 22, 2001, the parties filed a Unanimous Stipulation and Agreement concerning terms and conditions, and on April 12, 2001, the Commission issued an order approving that stipulation. In addition to resolving all issues relating to the terms and conditions under which SWBT will offer collocation, the stipulation created a framework for addressing collocation pricing. Under this framework, the Commission will first address the question of the model to be used for determining pricing, and then address model inputs. The sole issue in the first phase of this framework, and the sole issue addressed in this Report and Order, is whether to adopt the "Joint Sponsors' Model" or the "SBC Collocation Cost Model." The parties have stated the issue, in a filing made on April 10, 2001, as follows: "Which cost model should the Missouri Public Service Commission use to estimate the costs of, and set the rates for, the provision by Southwestern Bell Telephone Company of collocation in Missouri?"

The Joint Sponsors' model is self-contained. This allows a user to change inputs and see the way in which outputs are changed, as well as to see the relationship between groups of inputs and groups of outputs. Inputs in the Joint Sponsors' model are organized to identify investment and expense items that affect each collocation cost category.

The Joint Sponsors' model is a Microsoft Excel application with a graphical interface front end. The graphical interface allows a user to quickly and easily select a portion of the model to view. A very important point is that the model is not considered to be confidential. All of the collocation cost outputs for a collocation type are located on a single spreadsheet. A detailed instruction manual is available.

The Joint Sponsors' model allows a user to easily modify input values and observe the effect of the modification across an entire set of outputs. The Joint Sponsors' model makes all formulas and algorithms viewable, and has extensive back-up documentation that explains how the formulas and algorithms were developed. The Joint Sponsors' model accounts for all the rate elements necessary to provide for collocation. It covers caged physical collocation, shared collocation, cageless collocation, adjacent on-site collocation, adjacent off-site collocation, and virtual collocation. The Joint Sponsors' model provides an electronic audit trail that allows a user to identify an input and trace it through the model to the resulting output, or to identify an output and trace it back to the originating input.

The SBC model is supported by SWBT. The SBC model is inferior to the Joint Sponsors' model. The SBC model is not self-contained, but is an agglomeration of different models or cost studies. It is considered Highly Confidential in its entirety by SWBT. The SBC model does not have an easy to use set of inputs. It is not set up so that a user can easily change an input and easily see the result of the change. It does not have an instruction manual. Not all of its calculations are provided. As filed, it is, like the Joint Sponsors' model, based on a hypothetical central office, but the SBC model's hypothetical central office is patterned after currently existing central offices, rather than on efficiently designed central offices. It does not provide explicit costs for all types of collocation.

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The testimony of the Commission's Staff focuses on the questions of whether the two proposed models can treat non-recurring costs as recurring, and whether the two proposed models are TELRIC-compliant.¹ The question of categorizing non-recurring costs as recurring costs is more properly addressed in the next phase of this proceeding. The proponents of both models claim that their chosen model is TELRIC-compliant, and the Commission finds that both models do, in general, comply with TELRIC principles. Neither model gains an appreciable advantage over the other by virtue of its compliance with TELRIC principles.

Staff witness Thomas testified that he had worked with both models, and found the Joint Sponsors' to be more flexible. The Commission has also found this to be the case. Thomas testified, and the Commission finds, that changing non-recurring costs to recurring costs in the SBC model would require major modifications to the model. Recurring costs can readily be changed to non-recurring costs in the Joint Sponsors' model, and that issue will be addressed in the next phase. Staff witness Thomas also found two errors in the SBC model within the first 15 or 20 minutes of using it.

Conclusions of Law

The Commission concludes that the model chosen by the Commission must be easily usable by all parties, should not be confidential, and must be flexible so that any input or assumption can be changed in the next phase of this proceeding. While both models have been provided to the Commission and to all parties, the Joint Sponsors' model has two significant advantages: it is easier to use and it is not classified as Highly Confidential. If the Commission adopted the SBC model, in-house experts of the other parties would, according to the terms of the protective order, be precluded from using or even seeing it. The transcript of the hearing, and perhaps even the Commission's Report and Order, in the next phase would need to be designated as Highly Confidential. The use of a model by all the parties without the need to consider the model Highly Confidential will be a much more workable result.

The model chosen by the Commission must be flexible; that is, it should allow a user to adjust any input or assumption. The proponents of each model criticize the other model as inflexible. However, based upon examination of the actual models as filed in this case, it is clear that the Joint Sponsors' model is more flexible and considerably easier to use than the SBC model. Furthermore, the Joint Sponsors' witness Turner unequivocally stated on the stand that all inputs and assumptions in the Joint Sponsors' model can be changed. The Commission is relying heavily on Mr. Turner's assurances. Furthermore, by accepting the Joint Sponsors' model, the Commission is not making any decision about the propriety of the inputs or assumptions that make up that model.

Although not a basis for the Commission's adoption of the Joint Sponsors' model, it is worth noting that it has been chosen in every state where the state commission had a choice between it and the SBC model. The Joint Sponsors' model has been selected for use by California, Michigan, Nevada, Oklahoma, and Texas.

¹TELRIC, as used by the Federal Communications Commission, means total element long-run incremental cost.

The Commission concludes that the Joint Sponsors' model will be a an accurate and valid predictor of collocation costs and will be the easier model to use in the next phase of this proceeding. The Commission accordingly will order its use.

Late-filed Exhibits

Pursuant to direction from the bench at the close of the Phase 1 hearing, Late-filed Exhibits 19 and 20, electronic versions of the Joint Sponsors' and the SBC models, were timely filed and no party objected to their admission. They will be admitted.

IT IS THEREFORE ORDERED:

1. That the collocation cost model offered by the Joint Sponsors shall be used to estimate the costs of, and set the rates for, the provision by Southwestern Bell Telephone Company of collocation in Missouri.
2. That Late-filed Exhibits 19 and 20 are admitted into the record.
3. That all motions not previously ruled upon by the Commission in this case are hereby denied, all objections not previously ruled upon are hereby overruled, and all evidence the admission of which was not specifically denied is admitted.
4. That this order shall become effective on June 17, 2001.

Lumpe, Ch., Murray, Simmons, and
Gaw, CC., concur and certify
compliance with the provisions of
Section 536.080, RSMo 2000.

Deputy Chief Regulatory Law Judge: Lewis Mills

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In the Matter of the Application of St. Louis County Water Company, doing business as Missouri-American Water Company, for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Water Supply Line Near Its Certificated Area in Jefferson and St. Louis Counties, Missouri. _____

Case No. WA-2001-473

Decided June 19, 2001

Water §2. The Commission granted a certificate of public convenience and necessity authorizing a public water supply line connecting Applicant's certificated service areas in Jefferson and St. Louis Counties, Missouri, to the Jefferson County Consolidated Public Water Supply District C-1, permitting Applicant to sell water to the District.

**ORDER GRANTING CERTIFICATE
OF PUBLIC CONVENIENCE AND NECESSITY**

Procedural History:

On March 7, 2001, St. Louis County Water Company, doing business as Missouri American Water Company (MAWC or Applicant), filed an application with the Commission requesting permission, approval and a certificate of public convenience and necessity to construct, install, own, operate, control, manage and maintain a public water supply line near its certificated service areas in Jefferson and St. Louis Counties, Missouri. MAWC stated in its application that the proposed public water supply line is necessary to provide wholesale water service to the Jefferson County Consolidated Public Water Supply District C-1 (the District). In support of its application, Applicant filed a map of the proposed water supply line and a feasibility study. On April 3, Applicant filed a schedule of the proposed rates and charges and an estimate of the likely number of customers to be served.

On March 20, 2001, the Commission issued an Order Directing Notice and directed interested parties to file an application to intervene no later than April 9. No applications to intervene were filed. Also on March 7, Applicant filed a Motion for Protective Order, which the Commission granted by order issued on April 3.

On May 21, 2001, the Commission directed the Staff of the Missouri Public Service Commission to advise it no later than May 29 of the date on which it would file its Memorandum and Recommendation. On May 29, Staff advised the Commission that it would file its Memorandum and Recommendation no later than June 12. On June 12, Staff filed its Memorandum and Recommendation as promised. Thereafter, on June 13, the Office of the Public Counsel filed its response stating that it has no objection to Staff's Memorandum and Recommendation.

Findings of Fact:

Applicant is a Missouri corporation in good standing and is in the business of providing drinking water to the public.

Applicant has entered into a wholesale water purchase agreement to supply drinking water for the public to the District. The District faces a growth in its customer base of 320 per annum, which is expected to reach 400 per annum for the next 25 years, overburdening the District's existing wells during periods of high demand. At the same time, the quality of the District's wells is declining. Available surface water alternatives are undesirable.

Applicant is able to supply District's needs. The two systems are separated by some miles, requiring about 52,000 feet of 24-inch and 30-inch mains to connect the two. The proposed water supply line will generally run along highway rights-of-way or across private property; Applicant asserts that it will obtain all necessary easements and the approval of any affected governmental bodies, as necessary. Several other utility lines will be crossed by the proposed water supply line. Applicant will fund the construction with short term debt and internal funds, to be gradually converted to long term debt and equity.

Applicant proposes to construct the line in two phases. First, Applicant will link its Meramec Water Treatment Plant to the northeastern section of the District's service area with about 19,000 feet of 30 inch ductile iron main. Second, a link will be built from the initial point of connection to Highway M, consisting of about 33,360 feet of 24-inch ductile iron main. The project will cost, in total, about \$12 million.

Staff recommended that the Commission grant the requested authority. Staff agreed that there is a public need for the proposed supply line. Staff stated that the Commission has already approved Applicant's tariff for wholesale competitive pricing, effective April 1, 2001. Staff advised the Commission that Applicant should be required to file tariff sheets describing the proposed line. Staff also requested that the Commission approve the line as described by Staff in Attachment 1 to its Memorandum and Recommendation, in which certain errors are corrected. Finally, Staff recommended that the Commission reserve ratemaking treatment with respect to the proposed supply line.

The Public Counsel does not object to the requested certificate.

Conclusions of Law:

Applicant is a "water corporation" and a "public utility" within the intendments of Section 386.020, (42) and (58), RSMo 2000, and is subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, RSMo 2000.

A water corporation may not either begin construction of a water supply system or exercise any right under a franchise without first obtaining the permission and approval of this Commission.¹ The Commission may grant its permission and approval when, after "due hearing," it has determined that such construction or the exercise of such right under a franchise is "necessary or convenient for the public

¹ Section 393.170, 1 and 2, RSMo 2000.

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service.”² Since no one has requested either permission to intervene or a hearing in this case, the Commission determines that no hearing is necessary.³ The Commission may resolve this case on the basis of the pleadings.⁴ The Commission may impose such conditions as it deems reasonable and necessary upon its grant of permission and approval.⁵

Having considered all of the foregoing, the Commission finds that the proposed public water supply line is both necessary and convenient for the public service. Therefore, the Commission will authorize Applicant to construct, install, own, operate, control, manage and maintain a public water supply line as described by its application and the map and metes and bounds description filed in support thereof by the Applicant, as modified in Attachment 1 to Staff’s Memorandum and Recommendation.

IT IS THEREFORE ORDERED:

1. That St. Louis County Water Company, doing business as Missouri American Water Company, is granted a certificate of public convenience and necessity to construct, install, own, operate, control, manage and maintain a public water supply line as described herein.
2. That the certificate of convenience and necessity referenced in ordered paragraph 1 shall become effective on the effective date of this order; provided, however, that construction of the water supply line herein approved shall not begin until the tariff sheets referred to in ordered paragraph 3 have been filed with the Commission.
3. That St. Louis County Water Company, doing business as Missouri American Water Company, shall file with the Commission tariff sheets describing the service area herein granted and the water supply line herein authorized within 45 days of the effective date of this order.
4. That nothing in this order shall be considered a finding by the Commission of the reasonableness or prudence of the expenditures herein involved, nor of the value for ratemaking purposes of the properties herein involved, nor as an acquiescence in the value placed on said property.
5. That the Commission reserves the right to consider the ratemaking treatment to be afforded the properties herein involved, and the resulting cost of capital, in any later proceeding.
6. That this order shall become effective on June 24, 2001.

Lumpe, Ch., Murray, Simmons, and Gaw, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

² Section 393.170.3, RSMo 2000.

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

⁴ *Id.*

⁵ Section 393.170.3, RSMo 2000.

In the Matter of the Application of The Empire District Electric Company and White River Valley Electric Cooperative for Approval of a Written Territorial Agreement Designating the Boundaries of Each Electric Service Supplier Within the White Oaks Subdivision of the City of Branson, Taney County, Missouri.

*Case No. EO-2001-491
Decided June 27, 2001*

Electric §11. The Commission found that it had jurisdiction over the territorial agreement between an electric cooperative and a regulated electric utility pursuant to subsection 394.312.4, RSMo.

Evidence, Practice & Procedure §23. The Commission concluded that the territorial agreement between the regulated electric utility and the electric cooperative was not detrimental to the public interest and should be approved.

APPEARANCES

Gary W. Duffy, Brydon, Swearengen & England, P.C., 312 East Capital Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for The Empire District Electric Company.

Rodric A. Widger, Andereck, Evans, Milne, Peace & Johnson, LLC, 1111 South Glenstone, Post Office Box 4929, Springfield, Missouri 65808, for White River Valley Electric Cooperative.

John B. Coffman, Deputy Public Counsel, and *M. Ruth O'Neill*, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

David A. Meyer, Associate General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior Regulatory Law Judge.

REPORT AND ORDER

Procedural History

The Empire District Electric Company (Empire) and White River Valley Electric Cooperative (White River) filed a joint application on March 16, 2001, under Section 394.312, RSMo 2000¹, asking the Missouri Public Service Commission to approve a territorial agreement. The proposed territorial agreement is attached to this Report and Order as Attachment A.

¹All further statutory references are to the Revised Statutes of Missouri 2000 unless otherwise indicated.

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The Commission issued an Order and Notice on March 28, 2001, directing parties wishing to intervene in the case to do so by April 17, 2001. No applications to intervene were filed. On May 1, 2001, Empire, White River, the Office of the Public Counsel and the Staff of the Missouri Public Service Commission filed a Unanimous Stipulation and Agreement stating that the territorial agreement is not detrimental to the public interest and should be approved. A copy of the Unanimous Stipulation and Agreement is attached to this order and incorporated herein as Attachment B.

The Commission held an evidentiary hearing on May 18, 2001. All parties were represented at the evidentiary hearing.

Discussion

Empire is a public utility engaged in providing electric service to the public in the State of Missouri, subject to the jurisdiction of the Commission. Empire's principal place of business is located in Joplin, Missouri. White River is a rural electric cooperative corporation engaged in distributing electric energy and service to its members in Taney County, Missouri, and in other Missouri counties. White River's principal place of business is located in Branson, Missouri. White River is not subject to Commission regulation of its service or rates.

Empire and White River jointly applied for approval of a territorial agreement that would designate the service area for new structures in the White Oaks Subdivision of Branson, Missouri, located in Taney County. The agreement is designed to avoid duplication of facilities and to give more certainty to the electric services customers in the area as to which company is the electric supplier for the area. The agreement designates the boundaries of the exclusive electric service area for service of new structures. The territorial agreement does not require the transfer of any facilities or customers.

Before approving the proposed territorial agreement the Commission must determine that it is not detrimental to the public interest. The first factor the Commission will consider in deciding the appropriateness of this territorial agreement is the extent to which the agreement eliminates or avoids unnecessary duplication of facilities. The Applicants stated in their application and White River's witness testified that the territorial agreement would eliminate any future duplication of facilities in the subdivision.

Second, the Commission will consider the ability of each party to the territorial agreement to provide adequate service to the customers in its exclusive service area. And, the third area for Commission concern is the effect of approval of the territorial agreement on customers of the Applicants. The Applicants state that there will be no exchange of customers or facilities as a result of the agreement. The Applicants further state in the territorial agreement that White River will continue serving existing structures located in the subdivision and that Empire currently serves no customers in the subdivision. No party indicated any concern or presented any evidence questioning the ability of White River to provide adequate service to the customers in this exclusive service area.

Fourth, the Commission will consider a category of other cost and safety benefits attributed to the proposed territorial agreement. The parties presented

evidence that the agreement will promote efficiency by avoiding the duplication of distribution facilities and will also enhance certainty in whom to call for service within the designated territories. The parties stipulated that the agreement is not detrimental to the public interest.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

The Commission finds that approval of the territorial agreement signed by Empire and White River would avoid future duplication of facilities. The Commission finds that the Empire and White River are capable of adequately and safely providing the electric power supply, service, and maintenance needs of the customers in their service areas as designated in the proposed territorial agreement. The Commission further finds that the overall effect of the proposed territorial agreement would not be harmful to ratepayers, that the agreement would promote efficiency and safety, and reduce customer confusion.

The Commission further finds that the approval of this territorial agreement will not impair Empire's existing certificates of public convenience and necessity except as specifically limited by the territorial agreement.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of Empire pursuant to Section 386.250 and Chapter 393, RSMo. The Commission does not have jurisdiction over the services, activities, and rates of rural electric cooperatives such as White River except as specified in Section 394.160, RSMo.

When a cooperative enters into a territorial agreement with a regulated public utility the agreement must be approved by the Commission after hearing. Section 394.312, RSMo. The Commission may approve a territorial agreement if the agreement in total is not detrimental to the public interest. Section 394.312.4, RSMo. Based on the findings of fact it has made, the Commission concludes that the territorial agreement proposed by Empire and White River is not detrimental to the public interest and should be approved.

IT IS THEREFORE ORDERED:

1. That the Territorial Agreement attached to this order as Attachment A and signed by The Empire District Electric Company and White River Valley Electric Cooperative is approved.
2. That the Unanimous Stipulation and Agreement of the parties is approved.

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- 3. That no more than 30 days after the effective date of this order The Empire District Electric Company shall file revised tariff sheets in compliance with the Territorial Agreement approved in Ordered Paragraph 1.
- 4. That The Empire District Electric Company and White River Valley Electric Cooperative are authorized to perform in accordance with the terms and conditions of the Territorial Agreement.
- 5. This Report and Order shall become effective on July 7, 2001.

Nancy Dippell, Senior Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

Editor’s Note: The Stipulation and Agreement and the Territorial Agreement have not been published. If needed, these documents are available in the official case files of the Missouri Public Service Commission.

In the Matter of Laclede Gas Company’s Tariff to Revise Natural Gas Rate Schedules.*

*Case No. GR-99-315
Decided June 28, 2001*

Gas § 18. The Commission rejected the tariff sheets filed by Laclede Gas Company which were designed to produce an annual increase of approximately 6.1 percent (\$30.5 million) in charges for gas service.

Depreciation § 12, 22, 32. Gas § 27. Evidence, Practice and Procedure § 24. The Commission found that Laclede Gas Company failed to show that its depreciation calculation, with regard to net salvage was just and reasonable.

Depreciation § 32. Gas § 27. The Commission found that Laclede Gas Company had not committed to removing its natural gas holders, that the company had already recovered its capital investment in the natural gas holders, and that there was no interim net salvage value of the natural gas holders. Therefore, the Commission determined that it was not just and reasonable for current customers of the company to pay for the expense of removal when the ratepayers may receive no benefit from those payments.

APPEARANCES
Gerald T. McNeive, Jr., Senior Vice President-Finance and General Counsel,
Michael C. Pendergast, Associate General Counsel, *Thomas M. Byrne*, Associate

*This order contains a change approved by the Commission in an order issued on July 6, 2001. On August 14, 2001, the Commission denied a rehearing in this case. On September 11, 2001, this case was appealed to Cole County Circuit Court (01CV325280). On June 7, 2002, this case was appealed to the Missouri Court of Appeals Western District (WD61486). See page 436, Volume 8, MPSC 3d for another order in this case.

Counsel, and *Ellen L. Theroff*, Assistant General Counsel, Laclede Gas Company, 720 Olive Street, St. Louis, Missouri 63101, for Laclede Gas Company.

Ronald K. Evans, Managing Associate General Counsel, and *Susan B. Knowles*, Attorney, Ameren Services Company, One Ameren Plaza, 1901 Chouteau Avenue, Post Office Box 66149 (MC1310), St. Louis, Missouri 63166, for Union Electric Company, d/b/a AmerenUE.

Diana M. Vuylsteke, Bryan Cave LLP, One Metropolitan Square, 211 North Broadway, Suite 3600, St. Louis, Missouri 63102, for Adam's Mark Hotels, Alcoa Foil Products (Alumax, Inc.), Anheuser Busch Cos., Inc., The Boeing Company, Ford Motor Company, General Motors Corporation, Hussmann Refrigeration, MEMC Electronic Materials, Inc., Monsanto Company, Paulo Products Company, Procter & Gamble Manufacturing Company, and Ralston Purina Company (the "Missouri Industrial Energy Consumers").

Robert C. Johnson, Attorney at Law, 720 Olive Street, Suite 2400, St. Louis, Missouri 63102, for Barnes Jewish Hospital, DaimlerChrysler Corporation, Emerson Electric Company, and SSM HealthCare (the "Missouri Energy Group").

John D. Landwehr, Cook, Vetter, Doerhoff & Landwehr, P.C., 231 Madison Street, Jefferson City, Missouri 65101, for MRT Energy Marketing Company.

Douglas E. Micheel, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Thomas R. Schwarz, Jr., Deputy General Counsel, *Marc D. Poston*, Senior Counsel, *Cliff E. Snodgrass*, Senior Counsel, *David J. Stueven*, Assistant General Counsel, and *Nathan Williams*, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior Regulatory Law Judge.

SECOND REPORT AND ORDER

A Report and Order in this case was issued on December 14, 1999. An Order of Clarification was issued on December 21, 1999, and the Order Approving Tariffs issued December 23, 1999. On December 1, 2000, an Order and Judgment from the Circuit Court of Cole County was issued which remanded the case to the Commission for "findings of fact sufficient to support resolution of the net salvage issue." The Commission sets out the following findings of fact and conclusions of law in compliance with the Order and Judgment.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather

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that the omitted material was not dispositive of this decision. The Commission adopts in its entirety its previous Report and Order, and in addition makes these additional findings of fact.

Depreciation — Net Salvage Value

The method for calculating net salvage value with regard to depreciation rates is at issue in this case. The Staff of the Missouri Public Service Commission argued that to calculate the depreciation on the future cost of removal, the Commission should use the actual amounts the company is paying per year for the cost of removal. Laclede Gas Company argued that the calculation for depreciation should be made by estimating the future cost of removal and spreading that cost over the life of the asset.

Currently, Laclede is recovering more in depreciation for net salvage than it is spending. In addition, ratepayers will pay \$2.3 million more in depreciation annually under Laclede's method of calculation. Under Laclede's theory, it would be allowed to recover from its *current* customers the estimated cost of *future* expenditures. Laclede has no definite plans for the removal of the major assets involved in this net salvage calculation. Laclede is not currently spending funds on the removal or salvage of these assets. Laclede's arguments for spreading the costs of the removal of these assets among different generations of customers were not persuasive because of the uncertainty of how much cost will be incurred for removal, when the removal will occur, or if the removal will occur at all. Therefore, the Commission finds that Laclede has failed to meet its burden of showing that its depreciation calculation for net salvage is just and reasonable. Laclede has not shown why it is just and reasonable to recover from its current customers more than its current expenditures for net salvage.

The Commission finds that Staff's proposed calculation of net salvage cost is just and reasonable. Staff's proposed calculation will allow Laclede to collect from its current customers the amount Laclede is currently expending for final net salvage cost for mass property accounts. Staff's calculation will also allow recovery of the amount Laclede is expending for interim cost of removal for life span property accounts. Thus, Staff's calculation will allow Laclede to recover the amounts it is currently spending for net salvage without overrecovering from its ratepayers, which is a just and reasonable result. This level of net salvage is adequate to allow Laclede to fully recover the net salvage of all plant.

The Commission finds, therefore, that the calculation of net salvage cost in this case shall be performed in accordance with Staff's recommendations. Thus, current depreciation rates should reflect a net salvage component of the depreciation rate that, when multiplied by the plant balance, gives an annual accrual consistent with the current net salvage amounts experienced by Laclede. Laclede's current depreciation rates reflect this computation, and therefore, should remain unchanged, with the exception of Account 362, Gas Holders.¹ This will result in an annual accrual of \$21,054,647.

¹The treatment of depreciation for Gas Holders was discussed previously in the Report and Order.

The Commission further finds that Laclede's depreciation accrual balance represents an overrecovery of \$26,575,903. Therefore, in accordance with Staff's recommendation, the current depreciation rates, with the exception of Account 362, Gas Holders, shall remain in effect to allow the Staff to observe if the accrual balances continue to overrecover, underrecover, or stay constant.

Laclede has historically submitted a general rate case to the Commission every few years. This process of rate adjustment is sufficient to compensate Laclede if the net salvage should increase in the future. If in the future Laclede's expenditures for net salvage exceed the amount it is collecting from its customers, Laclede can and should apply for new depreciation rates.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Laclede Gas Company is a public utility engaged in the provision of natural gas service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 2000. The Commission also has the authority to prohibit implementation of gas service rates that are unjust or unreasonable rates. Section 393.130, RSMo 2000. The burden of proof to show that a proposed tariff is just and reasonable is upon the utility. Section 393.150.2, RSMo 2000.

The orders of the Commission must be based on substantial and competent evidence, taken on the record as a whole, and must be reasonable and not arbitrary, capricious, or contrary to law. Section 536.140, RSMo 2000. Based upon its findings of fact, the Commission concludes that in order to set just and reasonable rates, Laclede Gas Company's depreciation calculation for net salvage value shall be made in accordance with the Staff's recommendations.

IT IS THEREFORE ORDERED:

1. That the Report and Order issued on December 14, 1999, is readopted by the Commission in its entirety with the additional findings of fact set out in this Second Report and Order.
2. That the calculation of net salvage value for the determination of depreciation rates shall be done in accordance with Staff's recommendations.
3. That any objection not ruled on is overruled, any motion not ruled on is denied, and any exhibit not admitted is excluded.
4. That this Second Report and Order shall become effective on July 8, 2001.

Lumpe, Ch., Simmons and Gaw, CC., concur; Murray, C., dissents, with dissenting opinion attached; certify compliance with the provisions of Section 536.080, RSMo 2000.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I dissent from the majority's reaffirmation of our earlier decision that net salvage should be treated in accordance with Staff's suggested departure from the traditional, whole life method of depreciation.

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I would use this opportunity to reconsider that decision and determine that the appropriate calculation of whole life depreciation rates should include, as it traditionally has, an accrual for future net salvage. This would return us to the well-established policy of matching the costs of assets to the ratepayers who benefit from those assets. Such a determination would correct our mistaken reliance upon Staff’s inadequately supported position that the Commission should embrace a radical new policy that would separate the calculation of net salvage from the calculation of depreciation.
I respectfully dissent.

**In the Matter of the Application of Union Electric Company d/
b/a Ameren UE for a Variance from the Commission’s Rule
Requiring Separate metering for TheVolunteers of America
St. Louis Affordable Housing Corporation Project Located
at 14th Street and Chouteau Avenue in St. Louis, Missouri.**

*Case No. EE-2001-514
Decided June 28, 2001*

Electric §23. Commission waived requirement for individual metering and allowed master metering for elderly housing development where owner would pay utility bills and subsidize services.
Electric §29. Commission waived requirement for individual metering and allowed master metering for elderly housing development where owner would pay utility bills and subsidize services.
Electric §33. Commission waived requirement for individual metering and allowed master metering for elderly housing development where owner would pay utility bills and subsidize services.

ORDER GRANTING VARIANCE

On March 28, 2001, Union Electric Company d/b/a AmerenUE (UE) filed a request for variance from Commission rule 4 CSR 240 20.050 which requires a separate electric meter for each residential or commercial unit in a multi-occupancy building, where construction had begun after June 1, 1981. UE supplemented its application on April 6, 2001.
UE stated that The Volunteers of America St. Louis Affordable Housing Corporation (VOA or owner) has requested master metering for its elderly housing project (the “Project”), located at 14th Street and Chouteau Avenue, St. Louis, Missouri. The Project consists of the construction and operation of three new buildings to provide subsidized elderly housing. One new building will provide 30 one-bedroom and 10 two- bedroom apartments for elderly residents at subsidized costs. A second new building will provide 61 one-bedroom apartments and 1 two-bedroom apartment for elderly residents at subsidized costs. The third new

building will be a community center consisting of offices, resident recreation and meeting spaces, a library, a computer lab and space for mailboxes. This building will also serve as a secure entry point for the residents served by all three buildings.

UE stated that the VOA has requested that one master meter be installed for each building for the Project because it will be responsible for the payments of utility electric bills for each apartment and the common facilities. UE stated in its request that separate metering for each apartment would result in additional expenditures of approximately \$280 per apartment (the Commission's Electric Variance Committee calculated a gross additional cost of \$28,560). UE further related that the VOA presented that it would incur additional construction costs of \$76,500 to wire the buildings for individual metering. UE stated that it supports the owner's request for the master metering of the project because of the overall cost benefits.

The Commission's Electric Variance Committee filed its recommendation on June 21, 2001, recommending that the Commission approve UE's Application for Variance. The memorandum of the Individual Electric Metering Variance Committee (Committee) was attached to the Committee's pleading and marked as Appendix A. The Committee's recommendation noted that Commission rule 4 CSR 240 20.050(2) requires the installation of a separate electric meter for each residential or commercial unit in a multiple occupancy building where construction has begun after June 1, 1981. Further, the Committee noted that this Commission rule is aimed at compliance with certain sections of the Public Utility Regulatory Policies Act of 1978. 16 U.S.C. § 2625. Paragraph (d) of 16 U.S.C. § 2625 provides:

Separate metering shall be determined appropriate for any new building for purposes of section 2623(b)(1) of this title if

- (1) there is more than one unit in such building,
- (2) the occupant of each such unit has control over a portion of the electric energy used in such unit, and
- (3) with respect to such portion of electric energy used in such unit, the long-run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building.

The Committee stated that it reviewed the application and received information regarding the operation of the Project from UE and the VOA. The Department of Housing and Urban Development will subsidize the electric bills for the Project and the VOA will be responsible for payment.

The Committee stated that it considered the potential benefits to consumers of individual metering and finds that these potential benefits are likely to be of little value to consumers living in this proposed facility. The Committee stated that since the VOA will be paying the electric bills, the individual consumers will not directly receive the financial benefits of individual conservation and efficiency efforts. The Committee noted that receiving, processing, and paying separate bills for each apartment unit for electric service would be unnecessarily burdensome and costly for the VOA.

The Committee recommended the Commission issue an order approving the

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variance for electric service to the Project, for good cause shown, from the Commission's rule requiring separate metering.

The Commission has reviewed the application and the Variance Committee's recommendation and finds that for good cause shown, the Application for Variance from the requirement for separate metering for the Project located at 14th Street and Chouteau Avenue, St. Louis, Missouri, should be granted. Commission rules 4 CSR 240 2.060(11) and 4 CSR 240 20.050(5).

IT IS THEREFORE ORDERED:

1. That the Application for Variance filed by Union Electric Company d/b/a AmerenUE on March 28, 2001, is granted.
2. That this order shall become effective on July 8, 2001.
3. That this case may be closed after July 9, 2001.

Lumpe, Ch., Murray, Simmons and Gaw, CC., concur

Thornburg, Regulatory Law Judge

In the Matter of the Application of Missouri Public Service for a Permanent Waiver from Certain Provisions of 4 CSR 240-40.030(11)(B)5 and 4 CSR 240-40.030(12)(M)1.B for a Pipeline Segment Near Nevada, Missouri.

Case No. GE-2001-586

Decided June 28, 2001

Gas §41. The Commission granted a waiver to Missouri Public Service from Commission rules 4 CSR 240-40-030(11)(B)5 and 4 CSR 240-40-030(12)(M)1.B, which require the company to pressure test a segment of gas pipeline before increasing the operating pressure above its rated Maximum Allowable Operating Pressure.

ORDER GRANTING WAIVER

On May 12, 1998, in Case No. GO-98-508, Missouri Public Service, a division of UtiliCorp United Inc. (MPS or Company) filed an application for a permanent waiver from Commission rules 4 CSR 240-40.030(11)(B)5 and 4 CSR 240-40.030(12)(M)1.B. These rules require the Company to pressure test a segment of gas pipeline before increasing the operating pressure above its rated Maximum Allowable Operating Pressure (MAOP). MPS wants to operate a sixteen mile segment of line that serves the city of Nevada at a pressure of 175 pounds per square inch gauge (psig). Thirteen miles of this pipeline is currently rated to operate at this pressure, but three miles is rated at only 118 psig. The increase in MAOP

from 118 psig to 175 psig is needed in order to serve the increased demand for natural gas in Nevada, Missouri.

The rules from which MPS seeks a waiver would require MPS to increase the pressure on the three mile segment to 262.5 psig (1.5 times 175) and test it for leaks. Because of logistical problems with performing such a test on this segment of pipe, MPS requested that the Commission waive the requirement for it. Although it is presently required to leak survey this segment of pipeline once every three years, MPS proposed to increase surveys to once a year. MPS stated that safety will not be jeopardized by the granting of the waiver.

In its memorandum filed on June 11, 1998, in Case No. GO-98-508, Staff stated that the safety benefits derived from leak surveying this pipeline more frequently than required would exceed any safety benefits that would result from a one-time pressure test at 262.5 psig. Staff noted that this pipeline segment passed an uprating procedure in September of 1997 that involved raising the pressure from 60 psig to 175 psig in four equal steps, and conducting a leak survey after each pressure increase. Staff recommended that MPS be allowed to increase the MAOP of this pipeline segment to 175 psig, conduct a leak survey, and, following the proposal in the application, conduct an annual leak survey.

The Commission found that granting the waiver of the required uprating procedure was in the public interest, and would not compromise safety. However, the Commission did not permanently waive the application of the rule as requested by MPS, but waived its application for a period of three years. The Commission stated that, if MPS wanted to continue to operate the line at 175 psig after the three-year period, it would need to apply for another waiver.

As required in Case No. GO-98-508, MPS did, on November 5, 1998, raise the pressure to 175 psig and conduct a leak survey. Staff observed the leak survey, and noted that only one small, above-ground leak was detected.

In this case, on April 20, 2001, MPS requested that the Commission make permanent the temporary waiver granted in GO-98-508. The current request is identical in scope to the original request, and MPS again stated that granting the waiver will not be inconsistent with gas pipeline safety. MPS would continue annual leak surveys of the pipeline.

On May 24, 2001, Staff filed a recommendation in which it recommended that the Commission grant MPS a permanent waiver, and allow it to operate the pipeline at a MAOP of 175 psig. Staff conducted a gas safety inspection in April 2001, and determined that no leaks have been found, cathodic protection has been maintained as required, and that essential valves have been annually inspected and found to be in satisfactory condition. Staff stated that granting the waiver will not be inconsistent with gas pipeline safety, and should actually increase pipeline safety when compared to the minimum requirements. Staff recommended that the Commission provide notice to the federal Secretary of Transportation.

The Commission finds that granting the waiver on a permanent basis is in the public interest, and will not compromise safety. The Commission will grant the waiver and require that MPS continue to conduct annual leak surveys. The Commission will also direct that notice be provided to the Secretary of Transportation.

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IT IS THEREFORE ORDERED:

1. That the application for waiver filed by Missouri Public Service on April 20, 2001, is granted.
2. That Missouri Public Service shall conduct annual leak surveys on the pipeline segment that is the subject of the waiver.
3. That the Records Department of the Commission shall provide, by overnight delivery service, notice of the waiver granted herein (including a copy of the application, the Staff memorandum, and this order) to:
Stacey L. Gerard
Associate Administrator for Pipeline Safety
U.S. Department of Transportation - RSPA/Office of Pipeline Safety
400 Seventh Street, S.W., Room 7128
Washington, DC 20590.
4. That this order shall become effective on September 11, 2001.

Lumpe, Ch., Murray and Simmons, CC., concur Gaw, C., dissents

Mills, Deputy Chief Regulatory Law Judge

**In the Matter of Tariff Revisions of Missouri Gas Energy, a
Division of Southern Union Company, Designed to Increase
Rates for Natural Gas Service to Customers in the Missouri
Service Area of the Company.**

*Case No. GR-2001-292
Decided July 5, 2001*

Gas §18. The Commission approved a stipulation and agreement that permitted Missouri Gas Energy to increase its gross annual revenue by approximately 9.9 million dollars.

Gas §34. Based on a stipulation and agreement of the parties, the Commission granted Missouri Gas Energy an accounting authority order for its Safety Line Replacement Program costs, beginning on July 1, 2001.

Rates §15. The Commission approved a stipulation and agreement that directed Missouri Gas Energy, the Staff of the Commission, and any other interested parties to develop an experimental low-income rate, to be filed with the Commission no later than October 1, 2001.

**ORDER APPROVING SECOND REVISED STIPULATION AND
AGREEMENT**

On November 7, 2000, Missouri Gas Energy, a division of Southern Union Company, (MGE) filed revised rate schedules designed to increase MGE's annual revenues by approximately \$39,383,803. MGE's revised rate schedules were

assigned tariff number 200100529. On November 27, 2000, the Commission issued a Suspension Order and Notice that suspended MGE's revised rate schedules until October 6, 2001. On December 28, 2000, MGE resubmitted certain tariff sheets that had inadvertently been omitted from its earlier tariff filing. MGE requested that these additional tariff sheets be suspended for the same period as those submitted earlier. The additional tariff sheets were assigned tariff number 200100697. On January 22, 2001, the Commission issued an order that suspended the additional tariff sheets until October 6, 2001.

On June 25, 2001, the parties appeared for the scheduled hearing and announced that they had reached a stipulation and agreement that would resolve all disputed issues. The Commission recessed the hearing to permit the parties to commit their agreement to writing and on June 26, 2001, the Staff of the Commission, the Office of the Public Counsel, Midwest Gas Users' Association, Jackson County, the City of Riverside, and MGE filed their Second Revised Stipulation and Agreement.

Two parties did not join in the Second Revised Stipulation and Agreement, Kansas City Power & Light Company (KCPL) and the City of Kansas City. The Second Revised Stipulation and Agreement represents that KCPL neither opposes nor supports the provisions of the stipulation and agreement and will not request a hearing. Counsel for KCPL confirmed that position on the record. The City of Kansas City filed a Notice of Position Regarding Second Revised Stipulation and Agreement on June 26, 2001. The City of Kansas City indicates that it endorses and supports the parties' agreement regarding expansion of MGE's weatherization program. The City of Kansas City further indicates that it neither supports nor opposes the other aspects of the stipulation and agreement, and indicates that it does not request a hearing regarding any issue.

Commission rule 4 CSR 240-2.115(1) provides that if no party requests a hearing, the Commission may treat a stipulation and agreement as a unanimous stipulation and agreement. No party has requested a hearing regarding any issue and therefore, the Second Revised Stipulation and Agreement will be treated as a unanimous stipulation and agreement.

The Second Revised Stipulation and Agreement purports to settle all disputes between the parties, and provides that MGE should be authorized to receive a revenue increase in the amount of \$9,892,228 exclusive of funding for the experimental low-income rate proposed in the stipulation and agreement, and exclusive of gross receipts taxes or taxes or fees of a similar nature. The stipulation and agreement contains numerous other provisions to resolve disputed issues between the parties, including a provision requiring that MGE's rate increase should go into effect no later than August 6, 2001.

Staff filed Suggestions in Support of Second Revised Stipulation and Agreement on June 28, 2001. Also on June 28, the Commission conducted an On-the-Record Presentation at which the parties answered the Commission's questions regarding the proposed stipulation and agreement.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case, pursuant to Section 536.060, RSMo 2000. The requirement for a hearing is met when the

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opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.¹ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Second Revised Stipulation and Agreement.

IT IS THEREFORE ORDERED:

1. That the Second Revised Stipulation and Agreement filed on June 26, 2001, by Missouri Gas Energy, the Staff of the Public Service Commission, the Office of the Public Counsel, Midwest Gas Users' Association, Jackson County and the City of Riverside, is hereby approved as a resolution of all issues in this case (See Attachment 1).
2. That, as agreed to by the parties in the Second Revised Stipulation and Agreement, Missouri Gas Energy is granted an Accounting Authority Order for its Safety Line Replacement Program costs, beginning on July 1, 2001. In the event that Missouri Gas Energy does not file a general rate case by December 31, 2003, it shall commence amortization of these deferrals beginning January 1, 2004, over a ten-year period, and will cease further deferrals unless the Commission grants a new Accounting Authority Order.
3. That Missouri Gas Energy, the Staff of the Commission and any other interested parties shall develop an experimental low-income rate, the details of which, including a revised tariff sheet to implement the experimental low-income rate, shall be filed with the Commission no later than October 1, 2001. Major components of the experimental low-income rate shall be as provided in paragraph 14 of the Second Revised Stipulation and Agreement.
4. That the revised rate schedules filed by Missouri Gas Energy on November 7, 2000, and December 28, 2000, are rejected.
5. That Missouri Gas Energy is authorized to file tariff sheets designed to increase the gross annual revenue of Missouri Gas Energy in the amount of \$9,892,228, exclusive of funding for the experimental low-income rate authorized in this order, and exclusive of gross receipts taxes or taxes or fees of a similar nature, effective for services rendered on and after August 6, 2001.
6. That this order shall become effective on July 15, 2001.

Lumpe, Ch., Murray, Simmons and Gaw, CC., concur

Woodruff, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

¹*State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

**In the Matter of Kansas City Power & Light Company Regarding
an Incident at the Hawthorn Station, Kansas City, Missouri,
on February 17, 1999.**

*Case No. ES-99-581
Decided July 12, 2001*

Electric §32. The Commission accepted the Stipulation and Agreement of the parties as resolution of the investigation into an explosion that occurred on February 17, 1999, at a generating plant operated by Kansas City Power & Light Company, an electric corporation subject to Commission jurisdiction as a public utility. The explosion, at approximately 12:30 a.m. at Hawthorn Station's Boiler No. 5, destroyed the boiler and other structures at the plant; no person was seriously injured as a result of the explosion. The investigation concluded that the explosion was caused by the unintended introduction of natural gas into the boiler due to the malfunction of the boiler management system due to its flooding earlier that day by a wastewater overflow.

ORDER APPROVING STIPULATION AND AGREEMENT

Procedural History:

On June 1, 1999, the Staff of the Missouri Public Service Commission filed a Motion to Open Docket, stating that an explosion had occurred on February 17, 1999, at a generating plant operated by Kansas City Power & Light Company (KCPL), an electric corporation subject to Commission jurisdiction as a public utility. The explosion at Hawthorn Station's Boiler No. 5 occurred at approximately 12:30 a.m. Although the boiler was destroyed and other structures at the plant were damaged, no person was seriously injured as a result of the explosion. Staff stated that it had initiated a formal investigation into the incident and that, due to the quantity of debris, the investigation would likely require six or more months for completion. Staff requested that the Commission establish a case for the purpose of receiving information, including an incident report relating to the explosion at Hawthorn Station, and for the purpose of ordering an appropriate response to the information gathered by Staff. The Commission opened this case on June 4, 1999, and directed that Staff file its report in 120 days.

On October 8, 1999, Staff filed its Interim Report, noting that the investigation of the explosion was not yet complete and that the cause of the explosion had not yet been determined. The Commission directed that a report be filed within 120 days. On February 4, 2000, Staff filed its Second Interim Report, again noting that the investigation of the explosion was not yet complete and that the cause of the explosion had not yet been determined. The Commission again directed Staff to file another report within 120 days.

On June 6, 2000, Staff filed its Third Interim Report. Staff stated that the investigation of the explosion was still not yet complete and that the cause of the explosion had not yet been determined. Staff promised a formal incident report within 90 to 120 days of receiving the final investigation reports of KCPL and its contractor, Crawford Investigation Services (Crawford). Staff also promised

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another interim report within 120 days of the Third Interim Report, if the formal incident report was not yet ready at that time. Finally, Staff stated that KCPL expected to provide a report on their investigation to Staff on August 1, 2000. The Commission again directed Staff to file its report within 120 days and directed it to file any reports received from KCPL or Crawford when received.

On July 13, 2000, the Commission issued its Report and Order in Case No. EC-99-553, *GS Technology Operating Company, Inc., doing business as GST Steel Company, v. Kansas City Power & Light Company*. Ordered Paragraph No. 7 in that Report and Order stated:

That the Staff of the Missouri Public Service Commission, in its investigation of the explosion that occurred at Hawthorn Station Unit No. 5 on February 17, 1999, in Case No. ES-99-581, shall investigate and report to the Commission as to whether or not the safety procedures prescribed by the management of Kansas City Power & Light Company were adequate and appropriate, whether or not Kansas City Power & Light Company employees followed those safety procedures, and whether Kansas City Power & Light Company has provided adequate and appropriate training to its employees. Likewise, the Staff of the Commission shall investigate and report to the Commission in Case No. ES-99-581 as to whether or not the performance of Kansas City Power & Light Company's system has declined over the past decade and, if so, why.

On August 22, 2000, Staff filed its Notice to Commission, advising the Commission that the anticipated final investigation reports from KCPL and Crawford would be delayed. Staff further advised that it intended to file its final investigation report, together with the second report directed in Case No. EC-99-553, on or before January 25, 2001. The Commission directed Staff to implement the suggestions set out in its Notice to Commission.

On September 6, 2000, KCPL filed its motion for a protective order. KCPL asserted that its final investigation report in this matter would contain "Highly Confidential" information. KCPL further stated that the information in question was nowhere publicly available. Because the Commission ordinarily grants protective orders to protect sensitive company information and because no party objected to KCPL's request in this case, the Commission granted the protective order.

On January 23, 2001, Staff filed its Unopposed Motion for Extension of Time to File Report Concerning Kansas City Power & Light Company's Operations. Staff stated that, while its report concerning the Hawthorn Incident would be filed as expected on January 25, 2001, its accompanying report concerning KCPL's procedures, maintenance and performance would be delayed by 30 days, to February 26, 2001. The Commission granted the requested extension.

On January 25, Staff filed its Motion to File Staff Final Electric Incident Report accompanied by its *Staff Final Electric Incident Report (Incident Report)*, in HC and

NP versions as required by the protective order.¹ On February 1, the Commission directed KCPL to respond to Staff's Incident Report within 30 days and to respond to Staff's report concerning maintenance and performance over the past ten years, due to be filed on or before February 26, 2001, within 30 days of the date that report was filed. The Commission also directed Staff to file a reply to each of KCPL's responses, within 30 days of the filing of the response.

On February 26, the Staff filed its Motion to File Staff Final Electric Incident Report² accompanied by its *Evaluation of Kansas City Power & Light Company's System Performance and Employee Safety and Training Programs (Performance Evaluation)*, in HC and NP versions as required by the protective order. Also on February 26, KCPL filed its response, in HC and NP versions, to the *Incident Report*.

On March 9, Staff filed a Motion to Correct Record, stating that the official case file maintained by the Commission's Records Department did not include the correct version of the HC report entitled, *Hawthorn 5 February 17, 1999, Boiler Explosion Investigation Report*, prepared by KCPL. The Commission granted this motion on April 10.

On March 27, the parties filed their HC Stipulation and Agreement.

On March 28, Staff filed its reply to KCPL's response to Staff's *Incident Report*. Staff stated that all of its recommendations contained in the *Incident Report* were satisfactorily addressed in the Stipulation and Agreement filed on March 27 and that Staff would file, within 30 days, a Memorandum urging the Commission to approve the Stipulation and Agreement. Also on March 28, KCPL filed its response to Staff's *Performance Evaluation*. KCPL stated that it concurred with Staff's conclusions as stated in the *Performance Evaluation*. Staff replied to KCPL's response on April 24, stating that no comment was necessary.

On April 5, Staff filed its Memorandum in Support of Stipulation and Agreement. Staff states that the Stipulation and Agreement addresses the way in which KCPL will review the fuel-trip-control logic of the burner management system of its boilers and the fuel management system of its combustion turbines. The Stipulation and Agreement details the information that KCPL is to submit in interim reports to Staff and in a final report to the Commission. A complete list of the units to be included in this review is attached to the Stipulation and Agreement. Also attached to the Stipulation and Agreement is the schedule for performing the reviews. Each unit will be reviewed when it is otherwise off line for regular maintenance. Staff points out that the schedule can be changed if a more aggressive review is necessary to address specific problems. Additionally, KCPL has agreed in the Stipulation and Agreement to review its operating procedures to determine whether deficiencies exist in any of the manuals used by its employees. Finally, KCPL has agreed in the Stipulation and Agreement to shut off the fuel to any boiler or combustion turbine that is shut down for work on the burner management system or fuel management system.

¹"HC" is "Highly Confidential," that is, protected from further disclosure. "NP" is "Non-Proprietary," that is, public.

² Actually, this motion should have referred to Staff's Evaluation and not its Incident Report.

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On April 19, the Commission issued its Order Directing Filing. In this order, the Commission reviewed the course of this proceeding, noting particularly the many filings designated as “Highly Confidential” (HC) in whole or in part. The Commission directed the parties to file their responses, justifying each HC designation and describing with particularity the harm likely to result from disclosure. Staff responded on April 30 and KCPL responded on May 1. In its response, Staff stated that it has no independent interest in maintaining the confidentiality of any of this material. KCPL, in turn, explained that it had liberally applied the HC designation in order to prevent premature disclosure of information concerning the Hawthorn explosion. KCPL asserted that such premature disclosure could well prejudice its efforts to recover damages from entities responsible to some degree for the incident. However, KCPL further explained, the filing on April 1 of several lawsuits obviated the need for further confidentiality of much of the information filed herein.

Findings of Fact:

Based on the record before it, the Commission makes these findings of fact:

KCPL is engaged in generating, transmitting and selling electrical energy at retail to customers in the state of Missouri.

What happened at Hawthorn Station?

An explosion occurred at 12:28 a.m. on February 17, 1999, at Hawthorn Station, a generating plant operated by KCPL. The explosion destroyed Boiler No. 5 and damaged other structures at the plant. No persons were seriously injured as a result of the explosion. The destroyed boiler was scrapped and the construction of a new boiler is expected to be completed in June 2001. KCPL incurred losses in excess of \$450 million due to this explosion.

Why did the explosion occur?

The explosion occurred because natural gas entered the off line boiler and was ignited. The boiler was taken off-line at 1:55 p.m. on February 16, 1999, in order to repair a leak on a line to a feedwater heater. Natural gas entered the off line boiler because the boiler management system (BMS) sent an incorrect signal to the main gas trip valve and one of the main gas burner valves, opening them. The natural gas in the boiler was ignited by one of the boiler gas burner ignitors which the BMS incorrectly energized.

Why did the Burner Management System (BMS) fail?

At about 3:00 p.m. on February 16, 1999, the toilets in the control room area restroom overflowed into the control room. Wastewater flowed down through existing cable openings into the electronic cabinets of the BMS two floors below. KCPL personnel repaired the BMS by physically removing and drying components, and then reinstalling the dried components in the cabinets. During this process, two electronic addressing cards were incorrectly reinstalled. The result was that the BMS opened the main gas trip valve and one main gas burner valve and also energized two gas burner ignitors, thereby causing the explosion. The wastewater overflow into the BMS also caused a short circuit in a solenoid coil monitor device,

SCM3. This in turn prevented the DC-HWT latching relay from re-latching and sending a signal to close the main gas trip valve when the master fuel trip relay was reset during repair of the BMS. Thus, the BMS's intrinsic fail-safe system also failed.

Background:

Hawthorn Station is located on the Missouri River in Kansas City, Missouri. It consists of two units, Nos. 5 and 6. Unit No. 6 is a Siemens 140 MW combustion turbine which burns natural gas. Unit No. 6 entered commercial service in July 1999, some months after the explosion at Unit No. 5.

Unit No. 5 was a Combustion Engineering boiler which used natural gas to burn low sulfur, low BTU, western coal to produce high pressure steam to drive a 476 MW General Electric turbine generator. Unit No. 5 entered commercial service in May 1969. Boiler No. 5 was a drum-type boiler with tangential burners. Its walls consisted of vertical tubes welded side-by-side to form a rectangular box surrounding the boiler's furnace. The furnace was fired by gas burners in each corner. A large drum at the top of the boiler supplied water to the tubes and collected the steam.

Unit No. 5 was controlled by a BMS which was designed to shut down the boiler's fuel source whenever a trip occurred. The BMS consisted of a series of relays and latching relays interlocked with gas valves, ignitors, coal pulverizers, coal feeders, fans, and boiler control instrumentation. A relay is a device that acts like a switch. It consists of a solenoid coil and contacts. When the solenoid coil is energized, the contacts change position, either opening and breaking a circuit or closing and completing a circuit, depending on the type of relay.

The purpose of the BMS was to prevent the entry of either natural gas or an ignition spark into the boiler at inappropriate times. The BMS on Hawthorn Unit No. 5 was a Programmable Logic Controller (PLC) based system, installed in 1995. It consisted of a monitor screen in the third floor control room and cabinets containing electrical components on the first floor.

The events leading to the explosion:

On the afternoon of February 14, 1999, KCPL decided that Unit No. 5 could be placed back on-line, although repairs to the No. 4 feedwater heater were not yet completed. Standard startup procedures were initiated early on February 16 in order to return Unit No. 5 to service. However, by noon, it was apparent that air leakage from the still-unrepaired No. 4 feedwater heater was preventing the formation of a vacuum and thus the startup of the Unit No. 5 turbine. KCPL then initiated boiler shutdown procedures and, by 1:55 p.m., the Unit No. 5 boiler was again off line.

Meanwhile, KCPL maintenance personnel had contacted Reddi-Rooter at 7:15 a.m. on February 16 concerning flushing problems with the toilet near the Hawthorn 5 control room. These problems were due to a collapsed wastewater pipe located in the plant yard near the No. 2 wastewater lift station. A Reddi-Rooter serviceman arrived at Hawthorn at about 9:37 a.m. to begin repair work. He first attempted to clear the line through the toilet itself; when this effort proved unsuccessful, he moved to the sewer line cleanout access. At about 1:00 p.m., the Reddi-

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Rooter serviceman's jetting tool became stuck in a check valve in the sewer line serving the Unit No. 5 control room restroom. The check valve is a device which permits water to flow in only one direction, away from the restroom. However, with the jetting tool stuck in it, the check valve did not function correctly. At 2:00 p.m., the Reddi-Rooter serviceman notified the control room of the jetting tool stuck in the sewer line check valve and requested drawings of the sewer line.

Despite notification of the jetting tool stuck in the sewer line check valve, the control room personnel permitted an automatic sump pump on the sewer line to continue to operate, with the result that wastewater was pumped out of the third floor toilet and into the control room, damaging the BMS as already described. The pump in question was one of two located in the No. 1 waste water lift station; its operation was automatically controlled by a float in the sump. When the water in the sump reached the predetermined maximum level, the float caused a switch contact to close, starting the pump. The pressurized wastewater was able to escape past the check valve because it was jammed open by the stuck jetting tool. Some hundreds of gallons of wastewater were pumped through the restroom toilet and into the control room. The water then flowed down through cable openings and into the BMS two floors below.

The toilet overflow was not stopped until 3:00 p.m. The sump pump was not taken out of service until 4:00 p.m. Sometime after 5:00 p.m., the jetting tool was removed from the sewer line check valve. The Reddi-Rooter serviceman left the plant at 5:50 p.m.

The inundation of the BMS by the wastewater overflow caused numerous alarms to sound in the control room and caused the SCM3 to short circuit. KCPL operating and maintenance personnel then worked together to repair the BMS and to clear the various alarms. KCPL personnel repaired Rack No. 1 of the BMS as described previously between 4:00 and 4:30 p.m. They repaired Rack No. 2 between 9:00 and 9:25 p.m., inadvertently switching two addressing cards. As a result, the main gas trip valve opened, a corner gas valve opened and two ignitors were energized at 9:25 p.m. when Rack No. 2 was energized.

The Unit No. 5 boiler ignitors were alternately energized and de-energized as the cards were cleaned and Rack No. 2 was powered up and down. By 10:00 p.m., 145 MCF of natural gas had flowed into the boiler. At 10:08 p.m., a corner gas valve opened and one of three gas vent valves opened. Between 10:00 p.m. and 11:00 p.m., 263 MCF of natural gas entered the boiler. By 11:30 p.m., Rack No. 2 was powered up with no faults showing. The corner gas valve was open and the ignitors were operating. Between 11:00 p.m. and midnight, 268 MCF of natural gas entered the boiler.

At 9:30 p.m., when KCPL's repair personnel took a dinner break, the BMS was still not working properly. By 11:30 p.m., Racks Nos. 1 and 2 of the BMS were powered up with no faults indicated. Repair work then proceeded on SMC3 until the explosion occurred at 12:28 a.m.

Following the explosion, KCPL personnel saw natural gas flames shooting up and one of them manually closed the main gas valve at the Williams Gas Company metering point.

Were KCPL's safety and operating procedures adequate?

Staff concludes that, at the time of the explosion, KCPL's safety and operating procedures were adequate and none of its employees deviated substantially from those procedures.

The Stipulation and Agreement:

In settlement of this matter, the parties have entered into a Stipulation and Agreement that they ask the Commission to approve. Initially, the Stipulation and Agreement was designated highly confidential; however, as previously noted, KCPL has now retracted that designation.³ The Stipulation and Agreement includes 17 provisions, most of which are intended to reduce the possibility of a similar explosion in the future.

The Stipulation and Agreement provides that KCPL will hire a qualified consultant to test the BMS and fuel control management system (FCMS) of each of its non-nuclear plants "to determine whether the failure of any one device of the control system could result in a condition that is likely to result in or lead to a catastrophic event, such as an explosion or fire." Likewise, a consultant will review any proposed modifications to a BMS or FCMS before they are made. If KCPL does modify any BMS or FCMS, KCPL will identify the control-logic-trip sequence. KCPL will test each BMS and FCMS and provide an individual test report for each of its plants no later than December 31, 2002. KCPL will also review its operating procedures, including its maintenance and troubleshooting guides, and determine whether any modifications are necessary. KCPL will submit a report regarding its review of its operating procedures; KCPL shall compile and submit a single final report from the BMS, FCMS and operating procedures reports referred to in the Stipulation and Agreement, on or before December 31, 2002. KCPL will manually isolate the fuel from the boiler in any plant that is shut down and undergoing work on the BMS, FCMS or fuel-trip relays. KCPL will advise Staff as to how it will accomplish this at each of its plants.

Conclusions of Law:

The Commission makes these conclusions of law:

Jurisdiction:

KCPL is an "electric corporation" and a "public utility" within the intendments of Section 386.020, (15) and (42), RSMo 2000, and is therefore subject to the jurisdiction of this Commission under Chapters 386 and 393, RSMo.

³ KCPL stated, in its pleading filed on May 1, 2001, that "KCPL respectfully requests that the Commission maintain the highly confidential designation with respect to the Testing Schedules that are attached to the Stipulation as Attachment A-1 and A-2. KCPL has no objections if the Commission elects to remove the highly confidential designation from the remaining documents."

Public Safety:

The Commission is charged with the “general supervision” of all electrical corporations.⁴ The Commission is authorized to investigate the facilities, methods and procedures used by electrical corporations and to “order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such . . . electricity . . . system, and those employed in the manufacture and distribution thereof[.]”⁵ After notice and a hearing, the Commission may, “by general or special orders, by rules or regulations, or otherwise,” require a public utility to maintain and operate its system “in such manner as to promote and safeguard the health and safety of its employees, . . . customers, and the public[.]”⁶

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989). Since no one has requested a hearing in this matter, the Commission may resolve this case based on the pleadings and on the parties’ Stipulation and Agreement.

The Commission has considered the record, the proposed Stipulation and Agreement, and Staff’s Suggestions in Support of the Stipulation and Agreement. The Commission concludes that the chain of events resulting in the explosion at Hawthorn No. 5 has been identified and that the weaknesses in KCPL’s control systems and procedures that permitted the explosion to occur have also been identified. The provisions contained in the Stipulation and Agreement are reasonable and are designed to reduce or prevent the possibility of another, similar explosion. The Commission will approve the Stipulation and Agreement and direct KCPL to comply with its provisions.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on March 27, 2001, is approved.
2. That Kansas City Power & Light Company shall comply with the provisions of the Stipulation and Agreement herein approved.
3. That this order shall become effective on July 22, 2001.

Simmons, Ch., Lumpe, and Gaw, CC., Concur.
Murray, C., absent.

Thompson, Deputy Chief Regulatory Law Judge

Editor’s Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

⁴ Section 393.140(1), RSMo 2000.
⁵ Section 393.140(2), RSMo 2000.
⁶ Section 386.310.1, RSMo 2000.

In the Matter of the Application of Union Electric Company for an Order Authorizing: (1) Certain Merger Transactions Involving Union Electric Company; (2) The Transfer of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company; and (3) In Connection Therewith, Certain Other Related Transactions.*

*Case No. EM-96-149
Decided July 12, 2001*

Evidence, Practice & Procedure §§1, 24, 25, 32. A document filed with information designated as proprietary must comply with the Commission definition of Proprietary Information as stated in Commission Rule 4 CSR 240 2.085 and in the Protective Order that has been issued for that case. AmerenUE's motion did not comply with the rule or the protective order, and was therefore, declassified as proprietary information and reclassified as an open record.

Evidence, Practice & Procedure §§1, 24, 27. A Commission order is final, and cannot be collaterally attacked by the filing of a new pleading addressing the same issues unless a change of circumstances has occurred. AmerenUE filed a motion to stay the expiration of the Second EARP beyond its June 30, 2001 expiration date, and requesting a stay of Staff's filing of a proposed rate reduction, as previously authorized by Commission order. No change of circumstance exists to justify the Commission's reconsideration of its earlier order, and AmerenUE's motion is barred as a collateral attack.

Evidence, Practice & Procedure §§1, 24. The doctrine of laches acts to bar a claim filed so late that its delay works to the disadvantage or injury of the other parties. AmerenUE's motion, filed less than five working days before the expiration of the Second EARP, requesting stay of the expiration of the Second EARP, and a stay of Staff's authorized earnings investigation on July 1, 2001, was not reasonable or explained sufficiently to justify the lack of notice or real opportunity to respond to the motion. Therefore, AmerenUE's emergency motion may be barred by laches if it were not barred by Section 386.550, RSMo 2000.

APPEARANCES

James J. Cook, Managing Associate General Counsel, Union Electric Company, d/b/a AmerenUE, One Ameren Plaza, 1901 Chouteau Avenue, St. Louis, Missouri 63166 6149, for Union Electric Company, d/b/a AmerenUE.

Robert J. Cynkar, Cooper & Kirk, 1500 K Street, N.W., Suite 200, Washington, DC 20005, for Union Electric Company, d/b/a AmerenUE.

Joseph P. Bednar, Armstrong, Teasdale LLP, One Metropolitan Square, Suite 2600, St. Louis, Missouri 63102-2740, for Union Electric Company, d/b/a AmerenUE.

Robert C. Johnson, 720 Olive Street, Suite 2400, St. Louis, Missouri 63101, for Barnes Jewish Hospital, DaimlerChrysler Corporation, Emerson Electric Com-

*See page 211 for another order in this case. In addition, see Volume 5 MPSC 3d page 157, Volume 6 MPSC 3d page 28, and Volume 9 MPSC 3d pages 25, 396 and 399 for other orders in this case.

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pany, Lone Star Industries Inc., River Cement Company, SSM HealthCare, and Unity Health System (the Missouri Energy Group).

Robin E. Fulton, Schnapp, Fulton, Fall, Silvey & Reid, L.L.C., 135 East Main Street, Post Office Box 151, Fredericktown, Missouri 63645, for The Doe Run Company.

Ronald Molteni, Assistant General Counsel, Office of the Attorney General, Post Office Box 899, Jefferson City, Missouri 65102, for the State of Missouri, ex rel. Jeremiah W. Nixon, Attorney General.

Edward F. Downey, Bryan Cave, LLP, 211 North Broadway, Suite 3600, St. Louis, Missouri 63102, for the Adam's Mark Hotel, Alcoa Foil Products (Alumax, Inc.), Anheuser Busch, Inc., The Boeing Company, Ford Motor Company, General Motors Corporation, Holnam, Inc., Hussmann Refrigeration, ISP Minerals, Mallinckrodt, Inc., MEMC Electronic Materials, Monsanto Company, Precoat Metals, Procter & Gamble Manufacturing, and Ralston-Purina Company (the Missouri Industrial Energy Consumers).

John B. Coffman, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Steven R. Dottheim, Chief Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Shelly A. Register

REPORT AND ORDER

Summaries

A document filed with information designated as proprietary must comply with the Commission definition of Proprietary Information as stated in Commission Rule 4 CSR 240.2.085 and in the Protective Order which has been issued for that case. AmerenUE's motion did not comply with the rule or the protective order, and was therefore, declassified as proprietary information and reclassified as an open record.

A Commission order is final, and cannot be collaterally attacked by a new pleading addressing the same issues unless a change of circumstances has occurred. AmerenUE filed its motion to stay the expiration of the Second EARP beyond its June 30, 2001 expiration date, and to Stay Staff's filing of a proposed rate reduction, as previously authorized by Commission order. No change of circumstance exists to justify the Commission's reconsideration of its earlier order, and AmerenUE's motion is barred as a collateral attack.

The doctrine of laches acts to bar a claim filed so late that its delay works to the disadvantage or injury of the other parties. AmerenUE's motion, filed less than five working days before the expiration of the Second EARP, requesting stay of the expiration of the Second EARP, and a stay of Staff's authorized earnings investigation on July 1, 2001, was not reasonable or explained sufficiently to justify the lack

of notice or real opportunity to respond to the motion. Therefore, AmerenUE's emergency motion may be barred by laches if it were not barred by Section 386.550, RSMo 2000.

Procedural History

On June 25, 2001, Union Electric Company d/b/a AmerenUE filed an emergency motion requesting that the Missouri Public Service Commission temporarily stay the expiration of the Second Experimental Alternative Regulation Plan (Second EARP) and stay the filing of Staff's earnings investigation. AmerenUE requested expedited treatment by asking the Commission to order the other parties to file responsive pleadings, under seal, by the close of business on June 27, 2001, and that, by the close of business June 29, 2001, the Commission agree to a 120-day delay in the expiration of the Second EARP.

On June 25, 2001, the Commission issued an order directing the parties to file a responsive pleading to AmerenUE's emergency motion no later than June 27, 2001. All responsive pleadings objected to AmerenUE's emergency motion, on the basis that insufficient notice and opportunity to respond had been given, that the Commission had already ruled on these issues, and each requested that the Commission deny AmerenUE's request. The Commission heard oral argument on AmerenUE's motion on June 28, 2001.

Discussion

Improperly Filed Proprietary Information

AmerenUE initially filed its entire pleading under seal as a proprietary document pursuant to the provisions of Commission Rule 4 CSR 240-2.085 and the protective order previously issued in this case on December 13, 1995. AmerenUE did not file a public version of the pleading as required by the protective order and the rule. When directed by the Commission, AmerenUE filed an amended pleading on June 27, 2001, in its effort to comply with the rule and the protective order. At hearing on June 28, 2001, the responding parties alleged that AmerenUE's amended pleading still did not comply with the rule or the protective order, and the parties stated for the record that they did not waive the time given by the protective order in which the responding parties could object to the designation of the proprietary information claimed by AmerenUE.

Collateral Attack

In its responsive pleading, Public Counsel pointed out that the Commission had ruled on the continuation of the Second EARP in its order issued March 8, 2001, entitled Order Authorizing Earnings Investigation Filing July 1, 2001, which became effective on March 18, 2001. In its order of March 8, 2001, the Commission ordered that the Second EARP not be continued beyond its expiration on June 30, 2001. In that order, the Commission stated that "[t]he Commission is not approving modification or continuance of the Second EARP. As AmerenUE stated, if there is to be a new EARP, it will only come about by agreement of the interested parties." The Commission then found it "reasonable to establish a case for the purpose of rate reductions immediately following the expiration of the Second EARP." The Commission's March 8, 2001 order is a final order.

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Laches

The doctrine of laches requires a party to timely file a claim, or be barred by laches. Since the Commission issued its order on March 8, 2001, AmerenUE had ample notice and knowledge that the Second EARP would expire and that the Staff of the Commission would then be filing an earnings investigation case on or after July 1, 2001. There was no surprise or lack of notice to AmerenUE. Staff notified the Commission, AmerenUE and the other parties in its recommendation filed February 1, 2001, that a "conservative estimate" of the potential rate reduction was \$100 million. Thereafter, Staff continually notified AmerenUE of the excess earnings amounts which resulted from the cost of service runs performed by Staff after February 1, 2001. AmerenUE had ten days to file its request asking the Commission to reconsider its earlier order. AmerenUE's delay in filing, less than five working days before the expiration of the Second EARP, is certainly unreasonable.

AmerenUE did attempt to explain why it filed its emergency request so late. AmerenUE stated that it only became clear to AmerenUE several days before the emergency motion was filed that Staff was going to include in its request for rate reduction the specific amount that the Commission should consider if it agreed that a rate reduction was appropriate for AmerenUE. AmerenUE stated that it did not object to the rate proceeding the Staff was authorized to file, per se, but rather to the announcement of the significant amount of the rate reduction sought. AmerenUE stated that Staff had agreed in the past to the company's request to keep confidential such matters as the possible early termination of the EARP or the size of Staff's proposed rate reduction which would have a serious detrimental effect on the Company's standing in the financial community.

Staff responded that AmerenUE made its unprecedented request that Staff regard as proprietary the information contained in the Revenue Requirement Schedule 1 of Staff's EMS computer run on June 21, 2001. Staff asserted that AmerenUE had not previously requested the numbers generated by Staff regarding individual adjustments and the total dollar figure of excess earnings be treated as proprietary information. Staff reported that its response to AmerenUE was that such an unprecedented request should be made to the Commission and AmerenUE informed Staff that such a pleading would be filed. Staff further stated that it was not informed that AmerenUE would also be asking for a 120-day extension of the second EARP.

At the oral argument and in responsive pleadings, the other parties indicated that the time given for response to AmerenUE's June 25, 2001 emergency motion, two days, was insufficient and did not even give counsel, in some cases, the opportunity to contact and consult with their client. On this basis, all responsive parties requested that AmerenUE's motion be denied.

In oral arguments, AmerenUE argued to the Commission that it could set aside its earlier order pursuant to the authority established in Commission Rule 4 CSR 240 2.050(3), which gives the Commission the discretion to enlarge the time set for an act required by earlier order of the Commission. However, AmerenUE has the burden to persuade the Commission that it should exercise its discretion in setting aside its March 8, 2001 order. In addition, AmerenUE made no reference

to the Commission's March 8, 2001 order and made no request in its emergency order that the Commission set this order aside pursuant to Commission Rule 4 CSR 240-2.050(3), and therefore, the other parties were given no notice of this claim, and no opportunity to respond to this argument.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Improperly Filed Proprietary Information

AmerenUE filed an emergency motion on June 25, 2001, with the entire document designated as proprietary information. No public version of the document was filed along with the document containing proprietary information. AmerenUE's emergency motion requested expedited treatment and did not give the other parties the ten days permitted by the Protective Order issued December 13, 1995, to challenge the designation. On June 28, 2001, the Attorney General and the Public Counsel stated their objections on the record to the designation of proprietary information in the AmerenUE pleading. All responding parties reserved the right to file specific objections to the parts of the document designated as proprietary, if necessary, and given adequate time to respond.

Collateral Attack

On March 8, 2001, the Commission issued its Order Authorizing Earnings Investigation Filing July 1, 2001. This became a final order effective on March 18, 2001. In its order of March 8, 2001, the Commission ordered that the Second EARP not be continued beyond the expiration date of June 30, 2001. The Commission also authorized Staff to establish a case for the purpose of proposing rate reductions, if warranted, immediately following the expiration of the Second EARP. No appeal was taken on this order pursuant to Section 386.510, RSMo.

AmerenUE filed an emergency motion on Monday, June 25, 2001, requesting that the expiration of the Second EARP be stayed. If the Commission were to stay the expiration of the Second EARP, it would have the same effect as continuing the Second EARP. No change in circumstance is found which would make this emergency motion of a different character or nature than the Commission's Order Authorizing Earnings Investigation Filing July 1, 2001.

Laches

AmerenUE filed its emergency motion more than three months after the Commission issued its Order Authorizing Earnings Investigation Filing July 1, 2001. AmerenUE's emergency motion was filed on June 25, 2001, less than five working days prior to the expiration date of the Second EARP, on June 30, 2001. The other parties required to respond in two days were greatly disadvantaged given the shortened time required by AmerenUE's emergency filing. AmerenUE's

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explanation for filing its emergency request so late is not reasonable and the explanation given is not sufficient to overcome the disadvantage or injury that AmerenUE's delay places on the responsive parties.

In oral arguments heard on June 28, 2001, AmerenUE argued that the Commission could set aside their earlier order pursuant to the authority established in Commission Rule 4 CSR 240 2.050(3), which gives the Commission the discretion to enlarge the time set for an act required by earlier order of the Commission. AmerenUE made no reference to Commission Rule 4 CSR 240 2.050(3) in its emergency motion. AmerenUE's emergency motion did not request the Commission set the Commission's March 8, 2001 order aside. Therefore the other parties were again greatly disadvantaged by receiving no notice or realistic opportunity to respond to this claim.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of AmerenUE pursuant to Section 386.250 and Chapter 393, RSMo.

Improperly Filed Proprietary Information

AmerenUE initially designated its entire emergency motion as proprietary information, when, in fact, the emergency motion was not in its entirety proprietary information as defined by the rule or the protective order. AmerenUE's amended emergency motion still claims that information that they received from Staff concerning Staff's recommendation for proposed rate reduction is proprietary information.

Proprietary information is defined by Commission rule 4 CSR 240 2.010(17), and in the Commission's protective order issued December 13, 1995, as "[i]nformation concerning trade secrets, as well as confidential or private technical, financial and business information." While the numbers that Staff received from AmerenUE that it used in its calculations might qualify as proprietary financial information, Staff's results and recommendation for the proposed rate reduction do not qualify as AmerenUE's private financial or business information. The effect that Staff's recommendation may have on AmerenUE's financial status is speculative, at best, but in any event does not justify classification of this information as proprietary. The Commission concludes that AmerenUE's emergency motion is improperly classified as a proprietary document and that all portions of the document designated as proprietary, as shown in AmerenUE's Amended Motion filed on June 27, 2001, as well as any portion of the hearing held designated as closed and held in camera, shall be declassified, and these documents and the hearing record will now be reclassified as open records.

Collateral Attack

Section 386.550, RSMo 2000, states "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be

conclusive.” An order is final when no review is sought from an order within the time required under Section 386.510, RSMo 2000, or if a statutory review of the Commission’s order is unsuccessful.¹ In this case, no appeal was taken from the Commission’s order issued March 8, 2001, and therefore, the Commission’s March 8, 2001 order is immune to collateral attack. The Western District Appeals Court noted that only if some “change in circumstance has occurred since the last order”, then a pleading would constitute a new issue, and such a pleading would not be a collateral attack on the previous order in conflict with Section 386.550.² Therefore, AmerenUE must show that this emergency motion alleges some change in circumstance not previously considered by the Commission.

The Commission finds that no change of circumstances exists that justifies the Commission giving renewed consideration or expedited treatment to AmerenUE’s emergency motion. AmerenUE has had knowledge, since at least March 8, 2001, that the Second EARP would expire on June 30, 2001, and Staff had announced its intention to request a rate reduction of at least \$100 million, in its February 1, 2001 pleading. The Commission concludes that AmerenUE’s motion is estopped by Section 386.550, RSMo 2000, and that AmerenUE has not met its burden of showing that a change in circumstance has occurred since the Commission’s order of March 8, 2001.

Laches

Laches is neglect, for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what, in law, should have been done.³ The corresponding legal maxim is, *vigilantibus et non dormientibus jura subveniunt* (the laws aid those who are vigilant, not those who sleep upon their rights). Laches is not mere delay; but rather delay that works to the disadvantage or injury of another⁴.

Since the Commission issued its order on March 8, 2001, AmerenUE has had ample notice that the Second EARP would be allowed to expire on June 30, 2001, and that the Staff of the Commission would then be filing an earnings investigation case on or after July 1, 2001. There was no surprise or lack of notice to AmerenUE. In its response filed June 27, 2001, and in its recommendation filed February 1, 2001, Staff stated clearly that a “conservative estimate” of the potential rate reduction was \$100 million, and Staff continually notified AmerenUE of the excess earnings amounts which resulted from the cost of service runs performed by Staff regularly after February 1, 2001. AmerenUE has not shown good cause that would excuse the late filing of its emergency motion or cause the Commission to expedite a hearing on the merits. No reasonable excuse or explanation has been offered that justifies AmerenUE filing its motion so late that it deprives the parties of timely notice and an adequate opportunity to respond to the company’s motion. The

¹ See, *State ex rel. Ozark Border Electric Cooperative v. Public Service Com’n of Missouri*, 924 S.W.2d 597, 601 (Mo. App. W.D. 1996).

² 924 S.W.2d at 601.

³ *Lake Development Enterprises, Inc. v. Kojetinsky*, 410 S.W.2d 361, 367 (Mo. App. 1966).

⁴ *Kizior, et al. v. City of St. Joseph*, 329 S.W.2d 605, 610 (Mo. 1959).

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Commission concludes that the doctrine of laches would operate to bar the relief requested if it were not barred by Section 386.550, RSMo 2000.

Further, the Commission concludes that any ratemaking determination regarding AmerenUE's expenses in bringing this emergency motion or any other action arising out of this emergency motion may not be warranted, and the Commission will reserve the right to consider the ratemaking treatment to be accorded these expenditures in a later proceeding.

The Commission finds that because the Second EARP expired on June 30, 2001; that no further action is expected in this case, and that, therefore, this case may be closed.

IT IS THEREFORE ORDERED:

1. That the entire Emergency Motion of Union Electric Company To Temporarily Stay Expiration of the EARP and To Establish a Schedule for Further Proceedings and For Expedited Treatment, filed by Union Electric Company d/b/a AmerenUE, on June 25, 2001, and the portions of the Amended Emergency Motion, filed on June 27, 2001, which are marked as proprietary shall be declassified, and found noncompliant with the Commission Rule 4 CSR 240 2.010(17) or the Commission's Order Granting Protective Order issued December 13, 1995, and therefore, the document, or designated portions of the document, will be reclassified as an open document.
2. That the portions of the evidentiary hearing record declared closed for the purposes of hearing arguments regarding the alleged proprietary information shall be declassified and reclassified as an open record in its entirety.
3. That the Emergency Motion of Union Electric Company To Temporarily Stay Expiration of the EARP and To Establish a Schedule for Further Proceedings and For Expedited Treatment, filed by Union Electric Company d/b/a AmerenUE, on June 25, 2001, is denied.
4. That nothing in this order shall be considered a finding of the Commission regarding ratemaking determinations concerning AmerenUE expenses in bringing this emergency motion or any other action arising out of this emergency motion. The Commission further reserves the right to consider the ratemaking treatment to be accorded these expenditures in a later proceeding.
5. That this order shall become effective on July 22, 2001.
6. That this case may be closed on July 23, 2001.

Simmons, Ch., Lumpe, and Gaw, CC.,
concur and certify compliance with the
provisions of Section 536.080, RSMo 2000.
Murray, C., absent.

**In the Matter of an Investigation into an Alternative Rate Option
for Interruptible Customers of Union Electric Company
d/b/a AmerenUE.**

*Case No. EO-2000-580
Decided July 26, 2001*

Rates §15. The Commission denied large industrial customers discounted rates previously available to them. Those customers could earn discounts from curtailing their usage. AmerenUE asked the Commission to approve of discounted rates similar to the prior rates. The Commission refused, stating it would not be in the public interest to do so.

Rates §25. The Commission rejected the request of the large industrial customers to change their rates back to the previous rates. While the change would benefit the customers, it would not be in the public interest.

Rates §28. Pursuant to an agreement in an earlier case, Union Electric Company d/b/a AmerenUE discontinued an electricity rate that allowed large industrial customers a discount if they curtailed usage as required. The company later discontinued the rate, and three customers requested that the Commission require the company to implement the customers' proposal reinstated a discounted rate that was very similar to the discontinued rate. The Commission denied the request, finding that to grant the customers' request would not be in the public interest.

Rates §42. The Commission rejected the customers' request to allow the customers to designate a portion of their load as curtailable, and thereby receive a discount. These customers could receive a discount under the current tariffs by using the curtailment riders.

REPORT AND ORDER

Statement of the Case

Pursuant to agreement in an earlier Commission case, Union Electric Company d/b/a AmerenUE (Ameren) discontinued an electricity rate that allowed large industrial customers a discount if they were willing to curtail usage as required. Three customers that took advantage of the now-discontinued rate have asked the Commission to require Ameren to put in place a very similar discounted rate. Ameren and the Commission's Staff oppose the customers' request. The Commission holds that requiring Ameren to implement the customers' proposal is not in the public interest.

Findings of Fact

The Missouri Public Service Commission makes its findings of fact having considered all of the competent and substantial evidence upon the whole record. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

On May 3, 1999, in Case No. EO-96-15,¹ the parties to that case filed a

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Stipulation and Agreement. Among other things, that stipulation provided for the elimination of Ameren's Interruptible Power Rate 10M after May 2000. It also provided that Ameren would implement a new tariff, the Voluntary Curtailment Rider, by June 1, 1999. In the final provision relevant to this case, the stipulation provided that no party to Case No. EO-96-15 would object on procedural grounds to an application asking the Commission to consider an additional alternative rate option for interruptible customers. The Commission approved the stipulation in a Report and Order issued November 18, 1999. The customers received benefits in the settlement of Case No. EO-96-15 that counterbalanced the elimination of Rate 10M or they would not have agreed to its elimination.

On March 20, 2000, Holnam, Inc., Lone Star Industries, Inc., and River Cement Company (the customers)² filed a pleading requesting that the Commission open a case to investigate the establishment of an additional alternative rate option for interruptible customers of Ameren. There were only five customers on Rate 10M, and three of them are the applicants in this case. The customers assert that the difference in their collective cost of electricity between the now-defunct Rate 10M and current firm power rates is approximately \$2.5 million annually. They state that the interruptible rates that succeeded Rate 10M are substantially different from Rate 10M and unacceptable to them. The customers filed an outline of their proposal entitled "Proposed Interruptible Rate Concepts" on March 22. This proposal is sometimes referred to as "the Brubaker proposal."

The Staff of the Commission and Ameren, while careful to not oppose the customers' application on procedural grounds, filed pleadings opposing the application on substantive grounds. Ameren does not dispute the customers' \$2.5 million figure, but notes that it is the difference between the customers' rates under Rate 10M and their rates under firm-price tariffs, and does not take into account discounts the customers could receive under the Voluntary Curtailment Rider or the Option Based Curtailment Rider. Ameren asserts that the customers could take advantage of one or both of these riders.

Prepared written testimony was filed pursuant to the Commission-ordered procedural schedule, a number of procedural motions were filed and ruled upon, and an evidentiary hearing was held on November 20, 2000.

The issue presented is whether the Commission should order Ameren to file tariff sheets to implement the interruptible rate concepts proposed by the customers. The parties identified additional issues that would need to be addressed if the Commission decided this issue in the affirmative. Because the Commission concludes that ordering Ameren to file such a tariff would not be in the public interest, it is unnecessary to reach the other issues.

Under the now-defunct Rate 10M, the customers designated a portion of their "load," or total electricity they take from Ameren, as curtailable or interruptible. They received a discount based upon the size of the load designated as curtailable.

¹ EO-96-15 is styled "In the Matter of the Investigation into the Class Cost of Service and Rate Design for Union Electric Company." Union Electric Company is now doing business as AmerenUE.

² The customers, as part of a group called the Missouri Energy Group, or MEG, were parties to EO-96-15.

Under certain circumstances described in the tariff, Ameren could call upon them to curtail their load. If they did not curtail the entire designated portion, then for at least the next year they would be eligible for the discount based upon the amount they actually curtailed rather than the amount they originally designated. If they did not curtail at all, they would not be eligible for a discount for at least a year. In either instance, after a year, a customer who failed to curtail would have to demonstrate its ability to achieve the designated (or a new) level before again being eligible for the discount. Ameren did not shut off customers that did not curtail when called upon, nor was there any penalty (other than being ineligible for the discount) for failing to curtail.

The difference between what the customers paid under Rate 10M and what they now pay as firm customers is about \$2.5 million annually. The \$2.5 million calculation does not take into account the fact that the customers will no longer suffer the production losses that occurred under Rate 10M.³ The customers had approximately 40 megawatts of their total load that was subject to curtailment under Rate 10M. They believe that the Option Based Curtailment Rider would subject them to curtailment more frequently than Rate 10M did. The customers are critical of the way the Option Based Curtailment Rider operates. All of the customers participate in the Voluntary Curtailment Rider, and two of them have received discounts as a result, although the discounts are small in comparison to the yearly savings they achieved under the old Rate 10M. The customers testified at length about the incremental improvements their proposal achieves over the now-defunct Rate 10M, but none of that testimony provides evidence that shows that their proposal is in the public interest.

Under the former Rate 10M, the customers had approximately 40 megawatts of curtailable load. Curtailment under Rate 10M was voluntary, as it would be under the Brubaker proposal, although both provide incentives to customers to curtail when called upon to do so. Under Rate 10M, curtailments occurred about six times a year, for about ten hours each time. The cost to Ameren of these curtailments was about \$1 per kilowatt-hour or \$1000 per megawatt-hour. During the summer of 2000, Ameren met its peak loads at costs ranging from 10 cents to 14 cents per kilowatt-hour, and during the summer of 1999 the costs ranged from 10 cents to \$1.20, averaging 39 cents per kilowatt-hour.

The Brubaker proposal has a credit of \$5.00 per kilowatt per month. This credit is not cost-based, but rather is taken from the now-defunct Rate 10M. There is no evidence in the record about how or when it was developed. The average credit paid by other regulated Missouri electric utilities is only \$2.01.

At the time of hearing, Ameren had approximately 100 customers participating in the Voluntary Curtailment Rider, for a total of about 150 megawatts of curtailable load. It had another five customers on the Option Based Curtailment Rider, with another 24 megawatts of curtailable load. All of the rate concepts in the Brubaker proposal are incorporated, at least in part, in the Voluntary Curtailment Rider or the

³ The exact amount of these productions losses was not calculated, but the estimates in the record show that they were significant, and may have at times even exceeded the value of the discounts received under Rate 10M.

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Option Based Curtailment Rider. The pricing in these two riders is market-based, and both offer customers considerably more flexibility than either Rate 10M or the Brubaker proposal. The Voluntary Curtailment Rider is available to many more customers than was Rate 10M. It is available to many more customers than the Brubaker proposal would be. The participation in these two new programs more than offsets the 40-megawatt reduction in curtailable load from the elimination of Rate 10M. There is no evidence that the elimination of Rate 10M caused any decrease in Ameren's system reliability. The Commission finds that Ameren has adequate system reliability without Rate 10M and without the Brubaker proposal.

Conclusions of Law

The customers have raised two general arguments to support their request that the Commission require Ameren to implement the Brubaker proposal: that it will save them money, and that it will - in effect - offer Ameren 40 megawatts of capacity. The first does nothing to prove that implementing their proposal would be in the public interest; it simply shows that it would be in their interest.

The second argument fails as well. Only five customers took service under Rate 10M when it was available. Well over a hundred participate in the two new curtailment programs. The customers' curtailable load under Rate 10M was about 40 megawatts. Total curtailable load under the two new programs is approximately 170 megawatts.

Ameren has actually increased the amount of load that is subject to curtailment by eliminating Rate 10M and implementing the Voluntary Curtailment Rider and the Option Based Curtailment Rider. It may be that not all of the 170 megawatt load will be curtailed on any given day, but if the situation warrants, Ameren can set a high price under the Voluntary Curtailment Rider and get a high level of participation. The Commission concludes that Ameren, by eliminating Rate 10M and implementing the two new riders, has increased the system-reliability benefits of having interruptible load.

The customers contend that Ameren needs additional capacity, and that implementing their proposal would be a way to obtain 40 megawatts of capacity.⁴ While it might be a way, it is an expensive way. Ameren has been able to purchase power on the market the last two summers at an average cost much lower than it could have gotten under the Brubaker proposal. Furthermore, if Ameren determines to obtain more capacity through curtailments, it only has to increase the price under the Voluntary Curtailment Rider. The customers' arguments about the use of their proposal to meet Ameren's capacity needs are unpersuasive.

The Commission will not address the customers' complaints about the Option Based Curtailment Rider. The question of whether the two new curtailment riders are as favorable to these three customers as Rate 10M was, or the Brubaker proposal would be, is irrelevant to the issue of whether it is in the public interest to require the implementation of the Brubaker proposal. The Commission concludes that it is not in the public interest to require the implementation of the Brubaker proposal.

⁴ Strictly speaking, Ameren does not obtain additional capacity by having interruptible customers. Rather, it frees up its existing capacity to serve its firm customers.

Pending Motions

Less than a week after reply briefs were filed, on February 27, 2001, the customers filed a motion for oral argument, in which it raised no new issues. On March 20, Ameren filed a motion for leave to file a supplemental statement. The supplemental statement, which was included with the filing, explained Ameren's position about its capacity needs. On April 9, the customers filed a motion to reopen the record to take additional evidence and to implement the Brubaker proposal on an interim basis. On July 16, the customers filed another motion to reopen the record and to implement the proposal on an interim basis. These motions have to do with Ameren's alleged need for additional capacity, and most of them engendered responsive pleadings. Because none of the motions raise new allegations, and because the Commission has concluded that the Brubaker proposal is not in the public interest regardless of whether Ameren needs additional capacity, all of these motions are moot.

IT IS THEREFORE ORDERED:

1. That the request of Holnam, Inc., Lone Star Industries, Inc., and River Cement Company to require Union Electric Company d/b/a AmerenUE to implement an additional curtailable rate program is denied.
2. That all motions not previously ruled upon by the Commission in this case are hereby denied, all objections not previously ruled upon are hereby overruled, and all evidence the admission of which was not specifically denied is admitted.
3. That this order shall become effective on August 5, 2001.

Simmons, Ch., Murray and Lumpe, CC., concur
and certify compliance with the provisions of
Section 536.080, RSMo 2000.
Gaw, C., not participating

Deputy Chief Regulatory Law Judge: Lewis Mills

**In the Matter of GTE Midwest Inc. d/b/a Verizon Midwest's
Revised Tariff Sheets To Introduce an Optional Calling Plan
Called One Easy Price.**

*Case No. TT-2002-43
Decided July 31, 2001*

Telephone §33. Commission did not impute costs to determine whether calling plan was predatory and anticompetitive and approved local long distance rate plan where service was available for resale and matched a competitor's rates.

Telephone §36. Commission did not impute costs to determine whether calling plan was predatory and anticompetitive and approved local long distance rate plan where service was available for resale and matched a competitor's rates.

ORDER DENYING MOTION TO SUSPEND AND APPROVING TARIFF

On June 28, 2001, GTE Midwest Inc. d/b/a Verizon Midwest (Verizon) filed revised tariff sheets designated PSC Mo. No. 3, submitting 3rd Revised Sheet 2 and an Original Sheet 73. The tariff sheets have a proposed effective date of August 1, 2001. On July 24, 2001, AT&T Communications of the Southwest, Inc., filed its motion requesting that the Commission suspend the proposed tariff sheets. AT&T objected to the tariff sheets asserting that the calling plan presented would harm competition because it presents predatory pricing. AT&T requested intervention apparently desiring that the Commission initiate procedural steps necessary to bring this matter to an evidentiary hearing.

Verizon responded on July 26, 2001. Verizon states that it provides IntraLATA Long Distance Message Telecommunications Service as a competitive service in Missouri. And that the subject tariff filing introduces a new optional toll calling plan for residential customers called One Easy Price falling under Verizon's competitive Long Distance Message Telecommunications Service. Verizon states that its service offering under the tariff is a competitive service and that it matches an identical 9 cents per minute rate offered by AT&T. Verizon states further that it will offer this service for resale and that this resolves any concern regarding imputation of costs according to a prior Commission case *In the Matter of Southwestern Bell Telephone Company's Tariffs Designed to Revise P.S.C. Mo. No. 26, Long Distance Message Telecommunications Services, to Introduce Designated Number Optional Calling Plan*, Case No. TT-96-268.

The Commission's Staff filed its response to AT&T's motion on July 28, 2001. Staff states that previously on July 18, 2001, Staff had advised the Commission that it had no objections to the proposed tariff going into effect on August 1, 2001. Staff's position has not changed. Staff stated that the Commission has authority to reject the tariff if the service offering is below cost and the Commission makes a finding that such offering is inconsistent with the promotion of competition under Section 392.400.5, RSMo 2000.¹ Staff stated that Verizon is a noncompetitive company as defined in this statute and that the service offering is a competitive service. Staff stated that even if the service offering is below cost that Verizon is simply matching AT&T's rate for the same service. Staff stated that competition is promoted by allowing Verizon to match AT&T's rate.

The Commission finds that AT&T has failed to state a sufficient basis to support its motion to suspend. The Commission takes notice of its tariff files and of P.S.C. Mo. No. 15, AT&T Communications of the Southwest Inc., Message Telecommunications Service Tariff, Original Sheet 71.13. Verizon's tariff matches the 9 cent rate offered by AT&T under this tariff. Verizon has stated that it will make this rate available for resale by any competitor. Under these circumstances the tariff is consistent with the promotion of full and fair competition and should be approved.

¹ Section 392.400.5 states: It shall be unjust, unreasonable, and unlawful for a noncompetitive or transitionally competitive telecommunications company to offer or provide a competitive or transitionally competitive telecommunications service below the cost of such service as determined by the commission if the commission finds that such offering or provision of service constitutes conduct which is not consistent with the promotion of full and fair competition.

IT IS THEREFORE ORDERED:

1. That the motion to suspend filed by AT&T Communications of the Southwest, Inc., on July 24, 2001, is denied.
2. That the proposed tariff sheets submitted on June 28, 2001, by GTE Midwest Inc. d/b/a Verizon Midwest are approved to be effective on August 1, 2001.
3. That this order shall become effective on August 1, 2001.
4. That this case may be closed on August 2, 2001.

Simmons, Ch., Murray, Lumpe and Gaw, CC., concur

Thornburg, Regulatory Law Judge

In the Matter of the Application of Kansas City Power & Light Company for an Order Authorizing its Plan to Reorganize Itself into a Holding Company Structure.

*Case No. EM-2001-464
Decided July 31, 2001*

Electric §4. The Commission accepted the Stipulation and Agreement of the parties that the reorganization of Kansas City Power & Light Company as the subsidiary of an unregulated holding company, which also owns unregulated subsidiaries, including one intended to generate power for sale on the wholesale market, was not detrimental to the public interest.

**ORDER APPROVING STIPULATION AND AGREEMENT
AND CLOSING CASE**

The Missouri Public Service Commission is authorized to approve the corporate restructuring of public utilities where there is no detriment to the public interest. Kansas City Power & Light Company (KCPL) seeks permission to restructure itself and no party has objected. This order grants KCPL's application.

Procedural History:

On February 26, 2001, KCPL filed its application for approval of its plan to reorganize itself as a holding company. KCPL, which is an electric corporation and a regulated public utility, owns certain subsidiaries which are not regulated entities. KCPL proposes to reorganize so that a holding company will own KCPL and also each of its present subsidiaries.

On February 28, 2001, the Commission issued its Order Directing Notice, setting March 20 as the deadline for any interested person to file an application for leave to intervene. The Missouri Joint Municipal Electric Utility Commission and

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the City of Kansas City, Missouri, filed their applications to intervene on March 20. UtiliCorp United, Inc., filed its application on March 21. The City of Independence, Missouri, filed its application on March 23. Jackson County, Missouri, filed its application on March 26. The Empire District Electric Company filed its application on March 28. KCPL filed its response on March 29, and the Missouri Energy Group filed its application on March 30.

KCPL, in its response filed on March 29, expressed no objection to the applications filed by the Missouri Joint Municipal Electric Utility Commission, Independence, Kansas City, Jackson County, Empire, and UtiliCorp. KCPL never responded to Missouri Energy Group's application. All of the applications to intervene met the requirements of Commission Rule 4 CSR 240-2.075 and were granted on April 23. Also on that date, the Commission set a prehearing conference for May 1 and directed the parties to submit a proposed procedural schedule by May 8.

The prehearing conference was held as scheduled. At the prehearing conference, the parties advised the presiding officer that they had that day filed a Stipulation and Agreement resolving all of the issues in the case. The Stipulation and Agreement was, however, not unanimous. It was executed only by KCPL, Staff and the Office of the Public Counsel. The parties requested that the requirement that a proposed procedural schedule be filed by May 8 be suspended pending resolution of the Stipulation and Agreement. The Staff of the Commission also promised to file suggestions in support of the Stipulation and Agreement. Also on May 1, the Commission issued its order directing Staff to file either suggestions in support of the Stipulation and Agreement or a proposed procedural schedule by May 11.

On May 7, Intervenor the City of Kansas City and Jackson County advised the Commission that they neither supported nor opposed the Stipulation and Agreement and did not request a hearing. Also on May 7, Intervenor UtiliCorp advised the Commission that it neither supported nor opposed the Stipulation and Agreement and waived its right to a hearing. UtiliCorp stated that this waiver was conditioned upon certain considerations, including: that the Stipulation and Agreement is a compromise settlement between the signatories thereof; that it does not bind any non-signatory; that UtiliCorp does not concur nor acquiesce in the Stipulation and Agreement; that no general regulatory policy or precedent is thereby established by the Commission for application to any other regulated entity; and that UtiliCorp reserves the right to take a different or adverse position in any other case. Intervenor Empire District filed an identical waiver on May 7. The remaining parties filed nothing.

On May 11, Staff filed its response to the Commission's Order Directing Filing of May 1. This response took the form of suggestions in support of the Stipulation and Agreement.

On June 21, 2001, the Commission discussed this case at its regularly-scheduled Agenda meeting and determined to convene an on-the-record presentation to permit clarification of certain concerns. The Commission issued its Order and Notice on June 25, set the on-the-record presentation for July 5, and advised the parties that

[a]mong the topics that will be addressed are (1) the purpose and effect of the conditional waivers of the right to a hearing filed by two intervenors, and (2) whether it is in the public interest to permit Kansas City Power & Light Company (KCPL) to meet a portion of its future generation requirements via a purchase power agreement with Great Plains Power (GPP), an unregulated, competitive affiliate.¹

The Commission convened the on-the-record presentation as scheduled on July 5, 2001. All of the parties appeared except for the Missouri Joint Municipal Electric Utility Commission, which was excused. The Commissioners directed extensive questioning to KCPL.

On July 6, 2001, Great Plains Power, Inc. (GPP), entered its appearance in this case. On July 9, 2001, KCPL filed its First Amended Stipulation and Agreement. The First Amended Stipulation and Agreement differs from the original Stipulation and Agreement in only two respects: it adds GPP as a signatory and Section 9, relating to Combustion Turbines, has been largely rewritten. Like the original Stipulation and Agreement, the First Amended Stipulation and Agreement is not unanimous. It was executed only by KCPL, GPE, GPP, Staff, and the Office of the Public Counsel.

Also on July 9, Staff filed its Suggestions in Support of the First Amended Stipulation and Agreement. On July 10, 2001, KCPL filed its Motion for Expedited Treatment of the Approval of the First Amended Stipulation and Agreement. Therein, counsel for KCPL advises the Commission that he has been authorized by all parties except UtiliCorp and Empire District Electric Company to state on their behalf "that they will not request any hearings in this matter." KCPL prays that the Commission will act on its application no later than July 12, 2001, so that the proposed transaction may close on August 8, 2001, and public trading in the stocks of GPE may commence on August 9, 2001. Finally, on July 10, Intervenors Empire District Electric Company and UtiliCorp United, Inc., filed their pleadings stating that they have no objection to either the Motion for Expedited Treatment of the Approval of the First Amended Stipulation and Agreement or the First Amended Stipulation and Agreement. Both intervenors advised the Commission that they did not seek a hearing in this matter.²

On July 12, 2001, the Commission again considered this matter at its regularly scheduled Agenda session. The Commission again determined to set an on-the-record presentation, which it did by Order and Notice issued on July 17. KCPL also moved for a second on-the-record presentation on July 13.

The second on-the-record presentation took place as scheduled on July 27, 2001.

¹GPP is presently a subsidiary and not an affiliate, but will become an affiliate if the restructuring proposed by KCPL is approved.

²At the hearing on July 5, counsel for Intervenors Empire and UtiliCorp repeatedly assured the Commission on behalf of his clients that they had no objection to the Stipulation and Agreement.

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Findings of Fact:

KCPL is a vertically integrated public utility which generates, transmits and sells electrical energy at retail in the state of Missouri to some 230,000 residential customers and some 30,100 commercial customers. KCPL is regulated by this Commission, as well as by agencies of the state of Kansas and of the United States.

KCPL seeks approval from the Commission to restructure itself as a holding company with a single tier of operating companies. At the conclusion of the proposed reorganization, KCPL will be one of those operating companies. KCPL will still be a vertically integrated public utility. The reorganization will have no effect on the tax revenues of any Missouri political subdivision.

KCPL owns two subsidiaries, KLT, Inc. (KLT), and GPP. KLT invests in competitive, high-growth businesses, including telecommunications, gas production and development and energy services. GPP is a competitive, wholesale generator. KLT and GPP are not regulated by this Commission. GPP is, however, subject to regulation by the Federal Energy Regulatory Commission (FERC).

Specifically, KCPL proposes to form a new subsidiary, Great Plains Energy (GPE), which will in turn form a subsidiary, NewCo. KCPL will then merge into NewCo, with KCPL surviving. Each share of KCPL's preferred and common stock will convert into a share of GPE's preferred or common stock. KCPL will then pass ownership of its two other subsidiaries to GPE by dividend. The result will be a publicly traded holding company, GPE, with three wholly owned subsidiaries: KCPL, KTL and GPP. KCPL will not transfer any of its generating assets in the course of the proposed reorganization and its services to its Missouri customers will be unaffected. In addition to approval by this Commission, KCPL seeks approval from the Kansas Corporations Commission, FERC, the Nuclear Regulatory Commission (NRC), and the Federal Communications Commission (FCC). Additionally, KCPL will file a registration with the Securities and Exchange Commission (SEC).

Upon completion of the proposed restructuring and registration with the SEC, GPE will become subject to the Public Utility Holding Company Act (PUHCA). The First Amended Stipulation and Agreement contains contractual provisions that reflect many of the protections contained in PUHCA. Thus, should PUHCA be repealed, these protections will still be imposed on GPE, GPP and KCPL by the First Amended Stipulation and Agreement. PUHCA favors the use of service companies by affiliated corporations and KCPL anticipates that a service company subsidiary will eventually be formed by GPE. The allocation of costs between KCPL and its affiliates will be governed by a Cost Allocation Manual (CAM).

Both of the Stipulations and Agreements filed in this case contain the same conditions imposed in Cases Nos. EM-97-515 and EM-96-149, which involved Missouri utilities which became subsidiaries of registered holding companies. These conditions are intended to protect the Missouri customers of such utilities. The conditions relate to such matters as access to books and records, affiliate transactions, and the creation of a service company. The Stipulations and Agreements also contain provisions relating to surveillance reports, the CAM, transaction costs, and combustion turbines, among others.

In January of 2001, KCPL entered into a binding memorandum of understanding with General Electric Company under which KCPL may lease or purchase up to five combustion turbine generation units. Each of these units has a generating capacity of 77 MW. These turbines will not be completed until 2003. If the proposed reorganization is approved, KCPL anticipates seeking Commission approval to transfer its rights under the memorandum of understanding to GPP. KCPL anticipates that it will need an additional 231 MW of generation capacity in the next three years, that is, the generating capacity of three of the five combustion turbines. KCPL currently purchases less than five percent of its energy needs on the open market.

If the proposed reorganization is approved, KCPL may enter into a cost based purchase supply agreement with GPP to acquire this additional capacity. Such a cost based purchase supply agreement would provide power at a cost to ratepayers identical to costs under traditional cost-of-service based rates. The cost of power generated by a combustion turbine owned by GPP would be essentially identical to the cost of power generated by a combustion turbine owned directly by KCPL. KCPL, GPE and GPP further stipulated, at the on the record presentation on July 5, 2001, that they will not form a marketing subsidiary. KCPL also stated that its principal purpose in seeking to reorganize is to position itself for an anticipated deregulated environment in the future.

At the second on-the-record presentation, GPP stated that it is also exploring the possibility of building a 500 MW to 900 MW coal-fired, base-load generating plant near Weston Bend on the Missouri River. If built, this plant would generate power for sale on the open market. KCPL does not presently anticipate any need to use the output of this plant to meet the needs of its customers. This project is presently in a very early stage and the proposed plant may never be built at all.

Staff supports the First Amended Stipulation and Agreement and recommends that the Commission approve it. Staff states, in particular, that it contains additional and more specific protections relating to financial matters than the Stipulations and Agreements approved in Cases Nos. EM-97-515 and EM-96-149. Staff states its position that the proposed restructuring is not detrimental to the public interest. The Office of the Public Counsel is a signatory of the Stipulation and Agreement and also supports it. At both hearings, the Office of the Public Counsel stated that the Stipulation and Agreement contains adequate safeguards for ratepayers.

Conclusions of Law:

Based on the facts found herein, the Commission makes the following conclusions of law.

Jurisdiction

KCPL is an "electrical corporation" and a "public utility" within the intendments of Section 386.020, (15) and (42), RSMo 2000, and is thus subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, RSMo 2000.

No party has requested a hearing in this case. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has

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requested the opportunity to present evidence.³ Since no one has requested a hearing, the Commission may determine this case based on the pleadings.

The Non-unanimous Stipulation and Agreement

Pursuant to Commission rule, a non-unanimous stipulation and agreement may be deemed unanimous if no party requests a hearing within seven days of its filing.⁴ A failure to timely request a hearing constitutes full waiver of the right to a hearing.⁵ With respect to the First Amended Stipulation and Agreement at issue here, all of the parties have either signed it or affirmatively acted to notify the Commission that they would not request a hearing. Therefore, the Commission will deem the First Amended Stipulation and Agreement filed in this matter to be unanimous.

Mergers, Transfers and Stock Ownership

KCPL seeks authority to reorganize as described above under Section 393.190, RSMo 2000. That statute provides that a Missouri electric corporation may not transfer or encumber any part of its system without Commission approval.⁶ Likewise, it may not merge with another corporation without permission from the Commission.⁷ A regulated utility cannot lawfully acquire another regulated utility without Commission approval.⁸ Commission approval is also necessary for any corporation other than a utility to own more than ten percent of the total capital stock of a public utility.⁹

The Missouri Supreme Court, in *State ex rel. City of St. Louis v. Public Service Commission*, stated that, in considering such cases, the Commission must be mindful that the right to transfer or encumber property is an important incident of the ownership thereof and that a property owner should be allowed to do such things unless it would be detrimental to the public.¹⁰ The same standard is applied to proposed mergers and reorganizations. The Missouri Court of Appeals has stated that “[t]he obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility.”¹¹ This is the standard by which public detriment is to be measured in such cases. The Commission notes that it is unwilling to deny private, investor-owned companies an important incident of

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

⁴ Commission Rule 4 CSR 240-2.115, 1 and 3.

⁵ Commission Rule 4 CSR 240-2.115.3.

⁶ Section 393.190.1, RSMo 2000.

⁷ *Id.*

⁸ Section 393.190.2, RSMo 2000.

⁹ *Id.*

¹⁰ *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934).

¹¹ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

the ownership of property unless there is compelling evidence on the record showing that a public detriment is likely to occur.¹²

The Commission reads *State ex rel. City of St. Louis v. Public Service Commission* to require a direct and present public detriment.¹³ For example, where the sale of all or part of a utility's system was at issue, the Commission considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the asset safely and efficiently.¹⁴ In the present case, there is no evidence of a direct and present public detriment in the record and the parties believe that none is posed by the proposed reorganization. If the reorganization is approved, KCPL will still be a vertically-integrated public utility subject to regulation by this Commission; it will still serve the same customers with the same system pursuant to its existing tariffs.

Based on its consideration of the record before it, the Commission concludes that the proposed reorganization is not detrimental to the public interest and should be approved. Specifically, this includes approval for KCPL to merge with NewCo, approval for GPE to own more than ten percent of KCPL, and approval, to the extent that approval is needed, for KCPL to transfer ownership of KTL and GPP to GPE.

Issuance of Stocks and Bonds

KCPL also seeks authority under Section 393.200, RSMo 2000. That section provides that a public utility may not issue stocks, bonds, or other evidence of indebtedness without prior Commission approval.¹⁵ Commission approval is conditioned on a finding that the money thereby acquired is reasonably required for the purposes set out in the Commission's order.¹⁶ Permissible purposes include property acquisition, construction and maintenance, improvements, and the retirement of obligations.¹⁷

Based on its consideration of the record before it, the Commission concludes that the stock transactions proposed by KCPL are reasonably necessary for the purpose of the proposed reorganization and should be approved.

Dividends

KCPL also seeks authority under Section 392.210, RSMo 2000. That statute provides in pertinent part that an electrical corporation may not declare a dividend without Commission authority.¹⁸ Based on the record before it, the Commission

¹² *In the Matter of the Joint Application of Missouri Gas Company et al.*, 3 Mo.P.S.C.3d 216, 221 (1994).

¹³ *Supra*, 335 Mo. at 459, 73 S.W.2d at 400.

¹⁴ See *In the Matter of the Joint Application of Missouri Gas Energy et al.*, Case No. GM-94-252 (Report and Order, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220.

¹⁵ Section 393.200.1, RSMo 2000.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Section 393.210, RSMo 2000.

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determines that KCPL's proposal to transfer KTL and GPP to GPE via a dividend is reasonable and that the same will not have a detrimental effect on the public. Therefore, the Commission should approve the proposed dividend.

Reorganization

KCPL also seeks authority under Section 393.250, RSMo 2000. That statute provides that the reorganization of an electrical corporation is subject to Commission "supervision and control" and may not be had without authorization from the Commission.¹⁹ It also empowers the Commission to set the capitalization amount of the reorganized entity.²⁰

Based on its consideration of the record before it, the Commission concludes that the proposed reorganization is reasonable and is not a detriment to the public interest. Therefore, it should be approved.

IT IS THEREFORE ORDERED:

1. That the Motion for Expedited Treatment of the Approval of the First Amended Stipulation and Agreement, filed by Kansas City Power & Light Company on July 10, 2001, is granted.
2. That the application filed by Kansas City Power & Light Company on February 26, 2001, is approved.
3. That the First Amended Stipulation and Agreement, filed on July 9, 2001, is deemed to be unanimous. Further, the Commission finds the First Amended Stipulation and Agreement to be reasonable and approves the same. Kansas City Power & Light Company, Great Plains Energy, Inc., and Great Plains Power, Inc., are directed to comply with its provisions.
4. That Kansas City Power & Light Company is authorized to reorganize as described in its application referred to in Ordered Paragraph 2, above, subject to the conditions contained in the First Amended Stipulation and Agreement referred to in Ordered Paragraph 3, above. Kansas City Power & Light Company is authorized to take all necessary and lawful actions to effect and consummate the reorganization herein approved.
5. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions and expenditures herein involved. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.
6. That this order shall be effective on August 10, 2001.
7. That this case may be closed on August 11, 2001.

Simmons, Ch., Murray, and Lumpe, CC., concur.
Gaw, C., dissents, with dissenting opinion to follow.

Thompson, Deputy Chief Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

¹⁹ Section 393.250.1, RSMo 2000.

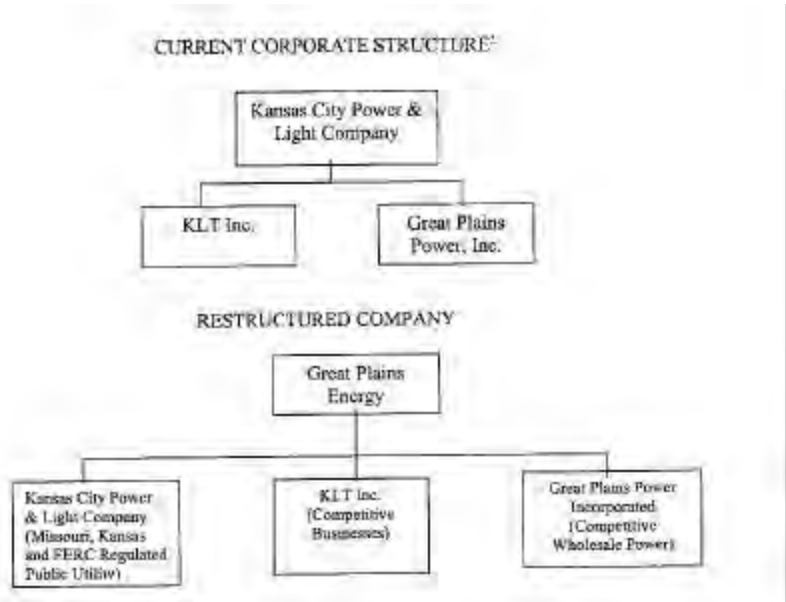
²⁰ Section 393.250, 2 and 3, RSMo 2000.

DISSENTING OPINION OF COMMISSIONER STEVE GAW

Kansas City Power & Light Company requests the approval of this Commission to reorganize its corporate structure so that its wholly-owned subsidiary, Great Plains Power, would become a sister corporation of Kansas City Power & Light and Kansas City Power & Light would become a subsidiary of Great Plains Energy, presently Kansas City Power & Light's subsidiary. The purpose of Great Plains Power will be to engage in the unregulated sale of electricity in the wholesale market, with no duty or obligation to the customers of Kansas City Power & Light. Because there is significant risk to the interests of Missouri consumers and because approval of this reorganization is another step toward the deregulation of electricity in the State of Missouri, I must respectfully dissent.

Discussion:

Kansas City Power & Light and subsidiaries request a reorganization of corporate structure, which will change the investors' interest in Kansas City Power & Light from stock ownership in a regulated utility to stock ownership in a non-regulated holding company, Great Plains Energy. The corporate structure changes as set forth in the parties' Stipulation and Agreement is illustrated below:



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The change in status presumably will create more interest from investors looking for riskier investment with the possibility of greater return from an unregulated entity. It will also allow unregulated profits for all affiliates except Kansas City Power & Light. Great Plains Power is to become an unregulated generator of electricity owned by unregulated Great Plains Energy. This is a part of the ongoing effort by this company to avoid regulation in the electricity market. This company's efforts, and those of others as well, have been to this point unsuccessful in the Missouri legislature. Nevertheless, changes in the Public Utility Holding Company Act in 1992 provided for the first time in more than a half-century that generation of electricity in this country could occur free of state regulation. This change in federal law has resulted in corporate restructuring among traditional investor-owned electric companies and the formation of new electrical generation companies. Even without changes in Missouri law, many new generation facilities are being built under new unregulated corporations, thus avoiding regulation by this Commission.

It is in this environment that the request before us arises. Missouri law requires that this request for reorganization of a regulated public utility be reviewed to determine whether it is detrimental to the interest of the public.¹ On this point there is a subtle but important distinction on the proper test. The majority cites **Fee Fee Trunk Sewer** for the proposition that this Commission "may not withhold its approval of the [reorganization] unless it can be shown that such [reorganization] is detrimental to the public interest." But that formulation of the test does not emphasize the fact that it is the applicant's burden to show that the reorganization poses no threat to the public interest. The Missouri Supreme Court has stated that it is the duty of this Commission "to see that no such change shall be made as would work to the public detriment."² In other words, Kansas City Power & Light should be required to show that the reorganization is not against the public interest. However, I believe that under either form of the test, the request should fail. Kansas City Power & Light and affiliates state that the proposed mission of Great Plains Power will be the building of generation facilities and wholesale wheeling of the electricity produced by them. The building of new generation facilities should be seen as a positive development in Missouri particularly if Missourians will have access to the power thereby generated.

Staff and Public Counsel have worked hard to ensure that the protections of review, particularly those against self-dealing between Kansas City Power & Light and its affiliates, continue after restructuring. This does not improve the protection existing under the current corporate structure – but it does help minimize the potential damage to Kansas City Power & Light consumers in transactions that might occur between Kansas City Power & Light and Great Plains Power after reorganization. However, it appears to overlook access that Kansas City Power &

¹ See *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

² See *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (banc 1934).

Light customers might otherwise have to electricity generated by Great Plains Power.

As a regulated utility, Kansas City Power & Light is required by Missouri law to have electricity available for its customers in a sufficient amount to meet their demand.³ The Stipulation and Agreement states that Kansas City Power & Light will need additional electricity to meet demand in the near future.

If the building of a coal-fired plant in Weston and additional gas-fired turbines under the ownership of Great Plains Power occurred under the current corporate structure, Kansas City Power & Light would have the ability as the sole shareholder of Great Plains Power to access as much of the electricity generated by Great Plains Power as it needed to meet customer needs. Those transactions would be subject to review by this Commission. Under the proposed structure, Kansas City Power & Light will have **no** control over the electricity generated by Great Plains Power. In fact, Great Plains Energy's responsibility to maximize profits to its shareholders will effectively prohibit the sale of electricity from Great Plains Power to Kansas City Power & Light unless the sale resulted in equal or greater profit to Great Plains Power than sale on the open market. Kansas City Power & Light's customers are losing access to Great Plains Power's generation assets as a result of this reorganization. They are also losing first chance at the power generated there. They may further be losing access to that electricity at the lower of cost of production or wholesale price.

Kansas City Power & Light and its affiliates stated that they would continue to pursue generation through Great Plains Power even if this reorganization were not approved. This scenario would allow the building of the planned generation facilities which would always be accessible to Kansas City Power & Light customers. This would provide the protection to Kansas City Power & Light customers that will no longer exist when Kansas City Power & Light gives up its stock ownership of Great Plains Power. When viewed in this way, it is clear that the transfer sought is not in the public interest.

There is another possible negative impact to consumers from the transfer of generation assets from Kansas City Power & Light to Great Plains Power. Under the existing corporate structure, Great Plains Power's profits would eventually go to Kansas City Power & Light, a regulated utility. An argument can be made that those profits should be considered by the Commission in reducing the rates that Kansas City Power & Light may charge consumers. While that argument may not succeed, it would be very difficult to make that argument at all under the proposed corporate structure, since Great Plains Energy and not Kansas City Power & Light will own 100 percent of Great Plains Power.

Another consideration is the financing that will be necessary to build the generation facilities planned by Great Plains Power. Kansas City Power & Light has told the Commission that Great Plains Power and Great Plains Energy presently have few, if any, assets. How, then, will they acquire the financing necessary to purchase or build generating facilities? The Weston plant, if built, will cost hundreds of millions of dollars. It would seem probable that the necessary

³Section 393.130.1, RSMo 2000.

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financing will only be available on the basis of the going concern value of Kansas City Power & Light itself. Indeed, Kansas City Power & Light or its affiliates may be required to guarantee that financing. If so, it imposes a potential risk upon Kansas City Power & Light's customers. Furthermore, Kansas City Power & Light's assets have been built and acquired in part by rates paid by Missouri consumers. Yet the new generation assets, built or acquired on the strength of Kansas City Power & Light's assets, will not benefit those consumers.

Finally, there is another reason why this restructuring should not be allowed. While the federal government has seen fit to continue to relinquish oversight of utilities, the same has not been true in this state. For several years, despite heavy lobbying from investor-owned utilities, the Missouri legislature has refused to change the state's policy on deregulation. The decision the Commission makes today takes one more step toward such a policy in spite of the clear message from the legislature opposing such a move. Removing a corporate entity that will become a new generator of electricity from the control of a regulated utility should be seen for what it is – a step furthering the purpose of deregulating the electric industry in Missouri.

It can persuasively be argued that the Commission is only being fair in its treatment of investor-owned utilities since it has previously approved a similar reorganization for at least one other utility. The people of this state should know however, that while no legislation has passed in Missouri changing regulation policy it is nonetheless occurring under the authority of changes in federal law. New generation built in the coming years will likely be in unregulated environments without the protections that consumers have taken for granted. Unless the people of this state through their elected officials change the policy of Missouri on the oversight of utilities, I do not wish to assist in further dismantling the protections of Missouri consumers that currently exist.

**In the Matter of the Application of Laclede Gas Company for an
Order Authorizing Its Plan to Restructure Itself into a Hold-
ing Company, Regulated Utility Company, And Unregulated
Subsidiaries.**

*Case No. GM-2001-342
Decided August 14, 2001*

Gas § 6. The Commission found that it was not detrimental to the public interest for Laclede Gas Company to restructure into a holding company, a regulated utility company, and unregulated subsidiaries as stipulated by the parties.

**ORDER APPROVING STIPULATION AND AGREEMENT
AND APPROVING PLAN TO RESTRUCTURE**

This order approves the unanimous stipulation and agreement of the parties and authorizes the restructuring of Laclede Gas Company into a holding company, a regulated utility company, and unregulated subsidiaries.

Procedural History:

On December 1, 2000, Laclede filed an application for authority to restructure, merge and form subsidiary companies. The Paper, Allied-Industrial, Chemical, and Energy Workers Local No. 5 6, AFL-CIO and the Paper, Allied-Industrial, Chemical, and Energy Workers Local No. 5 194, AFL -CIO were granted intervention on February 3, 2001. Barnes-Jewish Hospital, DaimlerChrysler Corporation, The Doe Run Company, Emerson Electric Company, Lone Star Industries, Inc., River Cement Company, SSM HealthCare, and Unity Health System (collectively known as the "Missouri Energy Group") were granted intervention April 3, 2001.

On July 9, 2001, the parties executed a Unanimous Stipulation and Agreement. On July 17, 2001, the Staff of the Missouri Public Service Commission filed its Suggestions in Support of the Stipulation and Agreement.

Findings of Fact:

Laclede is engaged in the business of distributing and transporting natural gas to customers in the state of Missouri.

Laclede seeks approval from the Commission to restructure itself as a holding company, The Laclede Group, Inc., with one of its subsidiaries, Laclede Gas Company, being the regulated public utility company within the state of Missouri. The proposed restructuring will not cause any change in the terms and conditions of the regulated utility services provided by Laclede. The reorganization will also have no effect on the tax revenues of any Missouri political subdivision.

Laclede proposes to restructure by a method known as reverse triangular merger. Laclede Gas Company will merge into Laclede Acquisition, Inc., and then Laclede Group, Inc., would hold all the common stock of Laclede Gas Company and its subsidiaries. Laclede Group, Inc., would then reorganize the subsidiaries, leaving all the regulated utility assets owned by the subsidiary named Laclede Gas Company.

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The stipulation and agreement filed in this case contains certain conditions. These conditions are intended to protect the Missouri customers of Laclede. The conditions relate to such matters as financial constraints, access to information, prior authorization from the Missouri Public Service Commission for mergers and acquisitions, method of cost allocation, and reporting requirements. Staff supports the stipulation and agreement and recommends that the Commission approve it. The Office of the Public Counsel is also a signatory of the stipulation and agreement.

Conclusions of Law:

Based on the facts found herein, the Commission makes the following conclusions of law.

Jurisdiction

Laclede is a “gas corporation” and a “public utility” within the intendments of Section 386.020, (18) and (42), RSMo 2000, and is thus subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, RSMo 2000.

No party has requested a hearing in this case. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.¹ Since no one has requested a hearing, the Commission may determine this case based on the pleadings.

Mergers, Transfers and Stock Ownership

Laclede seeks authority to reorganize as described above under Section 393.190, RSMo 2000. That statute provides that a Missouri gas corporation may not transfer or encumber any part of its system without Commission approval.² Likewise, it may not merge with another corporation without permission from the Commission.³ Commission approval is also necessary for any corporation other than a utility to own more than ten percent of the total capital stock of a public utility.⁴

The Missouri Supreme Court, in *State ex rel. City of St. Louis v. Public Service Commission*, stated that, in considering such cases, the Commission must be mindful that the right to transfer or encumber property is an important incident of the ownership thereof and that a property owner should be allowed to do such things unless it would be detrimental to the public.⁵ The same standard is applied to proposed mergers and reorganizations. The Missouri Court of Appeals has stated that “[t]he obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility.”⁶ This is the standard by which public detriment is to be measured in such cases. The Commission notes that

¹ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

² Section 393.190.1, RSMo 2000.

³ *Id.*

⁴ *Id.*

⁵ *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934).

⁶ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

it is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is compelling evidence on the record showing that a public detriment is likely to occur.⁷

The Commission reads *State ex rel. City of St. Louis v. Public Service Commission* to require a direct and present public detriment.⁸ For example, where the sale of all or part of a utility's system was at issue, the Commission considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the asset safely and efficiently.⁹ In the present case, there is no evidence of a direct and present public detriment in the record. If the reorganization is approved, Laclede will still be a public utility subject to regulation by this Commission; it will still serve the same customers with the same system pursuant to its existing tariffs.

Based on its consideration of the record before it, the Commission concludes that the reorganization as proposed in the verified application is not detrimental to the public interest and should be approved. Specifically, this includes approval for Laclede to merge with Laclede Acquisition, Inc., approval for the transfer of the stock of Laclede to The Laclede Group, Inc., approval for Laclede Group, Inc., to own more than ten percent of the common stock of Laclede Gas Company, and approval, to the extent that approval is needed, for any other transfers necessary to implement the reorganization as proposed in the verified application.

Reorganization

Laclede also seeks authority under Section 393.250, RSMo 2000. That statute provides that the reorganization of a gas corporation is subject to Commission "supervision and control" and may not be had without authorization from the Commission.¹⁰ It also empowers the Commission to set the capitalization amount of the reorganized entity.¹¹

Based on its consideration of the record before it, the Commission concludes that the proposed reorganization is reasonable and is not a detriment to the public interest. Therefore, it should be approved.

IT IS THEREFORE ORDERED:

1. That the verified application filed by Laclede Gas Company on December 1, 2000, is approved.
2. That the Unanimous Stipulation and Agreement filed on July 9, 2001, is approved.

⁷ *In the Matter of the Joint Application of Missouri Gas Company et al.*, 3 Mo.P.S.C.3d 216, 221 (1994).

⁸ *Supra*, 335 Mo. at 459, 73 S.W.2d at 400.

⁹ *See In the Matter of the Joint Application of Missouri Gas Energy et al.*, Case No. GM-94-252 (Report and Order, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220.

¹⁰ Section 393.250.1, RSMo 2000.

¹¹ Section 393.250, 2 and 3, RSMo 2000.

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3. That Laclede Gas Company is authorized to reorganize as described in its verified application referred to in Ordered Paragraph 1, above, subject to the conditions contained in the Unanimous Stipulation and Agreement referred to in Ordered Paragraph 2, above.

4. That Laclede Gas Company is authorized to take all necessary and lawful actions to effect and consummate the reorganization herein approved.

5. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions and expenditures herein involved. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.

6. That this order shall be effective on August 24, 2001.

7. That this case may be closed on August 25, 2001.

Simmons, Ch., Lumpe, and Gaw, CC., concur. Murray, C., absent.

Nancy Dippell, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996.*

Case No. TO-99-227
Decided August 28, 2001

Telecommunications § 1. The Commission directed Southwestern Bell Telephone Company to include Missouri data within the scope of the audit that has been ordered in the state of Texas.

**ORDER GRANTING MOTION TO INCLUDE MISSOURI DATA
IN THE AUDIT OF SOUTHWESTERN BELL IN THE STATE OF TEXAS**

This order grants the motion of AT&T Communications of the Southwest, Inc., requesting that the Commission direct Southwestern Bell Telephone Company (SWBT) to include Missouri data within the scope of the audit that has been ordered in the state of Texas.

* Please see pages 69, 73, 117, 150, 429 and 432 for other orders in this case. In addition, see page 181, Volume 9 MPSC 3d, for another order in this case.

AT&T filed a motion on August 14, 2001, requesting that the Commission direct SWBT to include Missouri data in the loop maintenance operations system (LMOS) and flow-through audit being conducted in the state of Texas. AT&T alleged that the results of the audit are necessary to determine if SWBT's previous performance data present material issues regarding competitive local exchange company (CLEC) access to unbundled network elements (UNEs) and the quality of SWBT's operations systems support. AT&T stated that the Public Utilities Commission of Texas "ordered an audit to address the LMOS and flow through issues."¹ AT&T also attached an Audit Plan to which SWBT, AT&T, and others agreed and which was submitted to the Texas Commission on July 27, 2001. Part of the agreed audit plan provides that the scope of the audit may be expanded to include other SWBT states if requested by that state commission.

According to AT&T, the audit will broadly cover the following LMOS issues:

(1) performance of SWBT systems in updating LMOS records on incoming CLEC orders today; (2) accuracy and completeness of revisions to SWBT's LMOS database to identify all lines currently serving CLEC customers, regardless of when the CLEC order was processed; (3) accuracy of performance measurement data being collected currently that is dependent on LMOS records; and (4) restatement of historical performance measurement data to adjust for errors caused by failure to update records in LMOS database.

According to AT&T, the audit will also cover the following flow-through issues:

(1) that on a current basis PM 13 is reported correctly (in accordance with the business rules) and is providing an appropriate parity comparison between the order processing flow-through that SWBT achieves for CLECs and the flow-through it provides to its own retail operations and (2) that SWBT has accurately restated its PM 13 data to include CLEC order types for which the SWBT retail equivalent would flow through EASE but were excluded from previously reported data and correct any errors.

The Staff of the Missouri Public Service Commission filed a response to AT&T's motion on August 17, 2001. In its response, Staff reported that it attended an April 4 5, 2001, workshop in the state of Texas during which SWBT acknowledged a problem with its LMOS system. Staff also included statements made by SWBT in a May 16, 2001, filing with the Federal Communications Commission. In those statements, SWBT indicated that it had corrected a problem with this system. SWBT had additional written *ex parte* communications with the FCC regarding the actions it has taken to resolve these issues. Staff recommended that the

¹ PUCT Project No. 20400, Order No. 33 (June 1, 2001).

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Commission direct SWBT to include Missouri data in the scope of the audit because it is important to Staff's role in monitoring SWBT's performance and its continuing obligation to keep markets open to competition.

On August 21, 2001, SWBT responded to AT&T. In its response, and at the on-the-record presentation held on August 16, 2001, SWBT explained to the Commission that it had identified a sequencing error in its LMOS. SWBT further explained that the error resulted in some CLECs being unable to submit trouble reports. SWBT stated to the Commission that the process has been corrected and that it is acting to restate performance measure results that may have been affected by the error.

SWBT argued that it is not necessary to include the Missouri data within the audit. SWBT stated that the results would only be relevant in Missouri for the limited time period from the approval of the Missouri 271 Interconnection Agreement (M2A) in March of 2001, to the time of the corrections to the LMOS in May 2001. SWBT also argued that the Ernst & Young audit performed in Missouri covers many of the same areas as the Texas audit. Therefore, SWBT believes that portions of the audit would be cumulative. SWBT stated, however, that it is willing to include Missouri data in the audit so long as it does not interfere with its pending 271 application at the FCC.

The Commission has considered the motion of AT&T and the responses of Staff and SWBT. The Commission determines that in order to continue its monitoring of SWBT's performance, it is important to have the complete picture of its performance. Therefore, the Commission will direct SWBT to include Missouri data within the scope of its audit being performed in the state of Texas.

IT IS THEREFORE ORDERED:

1. That SWBT shall include Missouri data in its loop maintenance operation systems (LMOS) and flow through audit currently pending at the Public Utilities Commission of Texas' Project No. 20400.
2. That this order shall become effective on September 7, 2001.

Simmons, Ch., Murray, Lumpe, and Gaw, CC., concur.

Dippell, Senior Regulatory Law Judge

**Staff of the Missouri Public Service Commission, Complainant,
v. Ozark Telephone Company, Respondent.**

and

**In the Matter of the Access Tariff Filing of Ozark Telephone
Company.**

*Case Nos. TC-2001-402 & TT-2001-117
Decided August 30, 2001*

Rates §§3, 8, 14, 110. Telecommunications § 14. Ozark filed a tariff that made permanent an interim increase in intrastate access carrier common line rates under previous Commission orders. The Staff audited Ozark, finding its rates and charges unreasonable. The Commission ordered that Ozark's tariff be modified, making its rates and charges reasonable and reducing its annual revenue.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

This order approves the unanimous stipulation filed by the parties.

Summary

Ozark Telephone Company filed a tariff that made permanent an interim increase in intrastate access carrier common line rates under previous Commission orders. The Staff audited Ozark, finding its rates and charges unreasonable. Should Ozark's tariff be modified, making its rates and charges reasonable and reducing its annual revenue?

The Commission, in approving the unanimous stipulation and agreement, answers yes.

Brief Procedural History

Case Number TT-2001-117

On August 23, 2000, Ozark submitted a revised tariff sheet, making permanent certain interim access rates that it implemented under reports and orders issued in case numbers TO-99-519 and TO-99-254.

On September 21, 2000, the Commission suspended the proposed effective date of the tariff to allow sufficient time to study the effect of the proposed tariff and to determine if it is just, reasonable, and in the public interest.

On November 13, 2000, AT&T Communications of the Southwest, Inc., and Southwestern Bell Telephone Company were granted intervention.

On December 22, 2000, Ozark withdrew the revised tariff sheet and refiled it on December 26, 2000. On January 9, 2001, the Commission suspended the tariff and directed the Staff to file supplemental rebuttal testimony, a stipulation, or an earnings complaint case, no later than January 31, 2001.

Case Number TC-2001-402

On January 31, 2001, Staff filed its complaint against Ozark, generally alleging that Ozark's rates and charges were unlawful and unreasonable, and a motion to consolidate the complaint case with Ozark's pending tariff filing case.

Consolidated Cases

The Commission consolidated the cases on March 15, 2001. On March 29, 2001, Ozark again withdrew its tariff filing and refiled the same revised tariff sheet on March 30, 2001. On May 30, 2001, the parties participated in a prehearing conference.

Stipulation and Agreement

On July 11, 2001, the parties filed a stipulation. Briefly restated, the stipulation contained the following points:

A. Rate Changes/Reductions

Ozark should file revised tariff sheets for service rendered on and after September 26, 2001, as follows:

1. Revised local tariffs designed to expand its local calling scope.
2. Revised intrastate access tariffs designed to: 1) consolidate the local switching rate elements; 2) eliminate the Feature Group A credit allowance; 3) eliminate the information surcharge rate element; 4) reduce intrastate access carrier common line rates; 5) reduce the local switching rates; and 6) reduce the Switched Transport Termination rate.

B. Interim Rates

Ozark has no refund obligation under the terms of its interim access tariff and will remove the interim rate language from its access tariff.

C. Depreciation Rates and Related Issues

1. Ozark should be directed to accrue depreciation expense and keep separate depreciation reserve accruals for each account and subaccount.
2. Net salvage cost should be booked as a current expense item.
3. Ozark must make correcting entries to its books of account reclassifying amounts that have been incorrectly booked to expense.

D. Rate Case Moratorium

1. With qualifying conditions, the parties will not participate in a case requesting a general increase or decrease in Ozark's intrastate revenues for 3 years.
2. The Commission will not forgo any discovery, investigative, or other power that the Commission presently has.

E. Miscellaneous

1. All of the prefiled testimony will be received into evidence.
2. Approval of the stipulation in its entirety by the Commission will resolve all issues in the matter.
3. The terms of the stipulation are interdependent. If the Commission does not approve the stipulation, then it will be void.
4. None of the parties have acquiesced in any ratemaking or procedural principle or any method of cost determination or cost allocation, and none of the parties will be bound by the terms of the stipulation, except as otherwise set out therein.
5. If the Commission approves the stipulation, the parties waive their rights: to present testimony, to cross-examine witnesses, to present oral argument and written briefs; to the reading of the transcript by the Commission; and to judicial review.
6. The Staff will file suggestions in support of the stipulation and the other parties may respond.
7. The Staff may provide, at any agenda meeting, whatever explanation the Commission requests.

Staff filed suggestions in support of the stipulation on August 14, 2001. Staff gave the following reasons for entering into the stipulation:

- (a) The stipulation provides that Ozark has no refund obligation under its interim access tariff. In direct testimony that the Staff filed in the complaint case on January 31, 2001, Staff witness William A. Meyer, Jr., recommended that the Commission order Ozark to refund all of the interim carrier common line surcharge collections. This recommendation was grounded upon the report and order that the Commission had entered in case number TO-99-254 on June 10, 1999, in which the Commission ordered that all interim carrier common line surcharge collections be made subject to refund, based upon an earnings review. However, the Cole County Circuit Court reversed and remanded the Commission's order in case number TO-99-254 on January 27, 2000, and on January 16, 2001, the Western District of the Missouri Court of Appeals affirmed the decision of the Cole County Circuit Court. That decision by the Court of Appeals was not yet final when the Staff filed its direct testimony in the complaint case, but it is now final and it cannot be further appealed. The effect of the decision by the Court of Appeals was to preclude the Commission from making the interim carrier common line surcharge collections

subject to refund. The Staff has therefore concluded that the Commission cannot order a refund, and that Ozark has no refund obligation under the terms of the interim access tariff.

(b) In rebuttal testimony that he filed in the tariff case on November 30, 2000, Staff witness Roy M. Boltz, Jr., stated that Staff's preliminary findings indicated Ozark had a negative revenue requirement of approximately \$700,000. The Staff subsequently made adjustments to its preliminary findings and determined that Ozark had a negative revenue requirement of \$648,717, as shown in the Accounting Schedules that the Staff filed with its direct testimony in the complaint case, on January 31, 2001. On May 21, 2001, Ozark witness Robert C. Schoonmaker testified that Ozark's revenue requirement was a revenue reduction of \$353,952. The difference between the revenue requirement claimed by the Staff and the revenue requirement claimed by Ozark was therefore \$294,626.

(c) The difference between the Staff's calculation of the revenue requirement and Ozark's calculation of the revenue requirement consisted of the following items and amounts:

Difference in amounts claimed for rate case expense:	\$ 15,523
Amount for Oklahoma and Arkansas dues & assessments:	2,575
Difference in amount allowed for director's fees:	8,941
Depreciation reserve and cost of removal:	4,243
Payroll annualization adjustment:	34,766
Change resulting from different depreciation rates:	16,041
Difference due to change in allowable return on equity:	20,241
Difference due to inclusion of income tax:	178,615
Difference due to treatment of extraordinary retirement:	13,681
TOTAL	\$294,626

(d) After negotiation, the parties agreed to recommend a settlement providing for an overall revenue reduction of \$547,953. The Staff believes that this is a reasonable revenue reduction in this case. It is about \$100,000 less than the amount that the Staff claimed in the direct testimony that it filed in the complaint case, and it is about \$194,000 greater than Ozark acknowledged to be reasonable in the rebuttal testimony that it filed in the complaint case.

(e) The recommended revenue reduction is a negotiated, lump-sum settlement of a number of disputed issues. The parties did not attempt to allocate the agreed-upon reduction

to any specific items of revenue requirement, and the Staff has not explicitly or implicitly conceded, and will not concede, that its filed position on any specific item of revenue requirement is in error. This is the compromise settlement of a number of disputed issues. As is the case with any revenue requirement settlement, the Staff based its opinion of a fair settlement amount upon a subjective analysis of the probable outcome of a decision by the Commission, if the case were to proceed to a hearing. In evaluating the settlement, the Staff also gave weight to the benefits of avoiding the costs related to litigating a complaint case, which probably would have to be considered in rates.

(f) The stipulation provides that Ozark would expand its local calling scope so that customers in Ozark's exchanges, which serve Noel and Southwest City, will be able to call customers in the exchanges that are served by the Goodman and Seneca Telephone Companies, which are affiliates of the Ozark Telephone Company. This is consistent with the trend in recent years to expand the geographic areas in which calls can be placed on a local, tollfree basis. The effect of thus expanding the local calling scope will be to reduce Ozark's revenues by about \$45,600 per year.

(g) The remainder of the rate reduction that the parties agreed upon (as discussed in paragraph 8 of Staff's suggestions) is \$502,353. The stipulation provides that the local switching rate elements, for both originating and terminating rates and for both interLATA and intraLATA calls, be consolidated into a single rate, and that this rate be established at \$0.01 per minute. This is consistent with the Commission's policy to encourage consolidation of such rates, as articulated at pages 16 and 17 of the report and order in case number TO-99-254, and it is identical to the rates that Staff witness Thomas A. Solt recommended in the direct testimony that he filed in the complaint case. The Staff further notes that this establishes Ozark's rates at the lowest level of any secondary carrier in the state. The effect of this change is a net reduction in Ozark's revenues of \$328,032 per year.

(h) The remainder of the rate reduction that the parties agreed upon, after applying the reductions (as discussed in paragraphs 10 and 11 of Staff's suggestions) is \$174,322. The stipulation provides for specified reductions in the local switching rates, the switched transport termination rate and the switched transport facility rates that will produce this overall

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reduction in revenues. Each of these rates will be reduced to a little more than 25 percent of the presently existing rates, in a manner that approximates an across-the-board reduction. The parties have agreed that the local switching rates will be reduced to \$0.007106 per minute, for both Feature Group A & B and for Feature Group C & D. The parties have also agreed that the switched transport termination rates will be reduced to \$0.001390 per minute, and the switched transport facility rates will be reduced to \$0.000150 per minute per mile. This rate design is consistent with the testimony of Staff witness Solt, and the Staff believes that this is an equitable way to achieve the agreed-upon overall reduction in Ozark's revenues.

(i) The stipulation provides that Ozark should be directed to accrue, effective October 1, 2001, depreciation expense based upon the depreciation rates for the plant accounts and subaccounts set forth in the supplement to unanimous stipulation. These are the depreciation rates that the Staff has developed and is proposing for use by small telephone companies. The estimated impact of the revised depreciation rates is a decrease of \$13,004 in the annual depreciation accrual, based on December 31, 1999 plant balances.

(j) The stipulation provides for a rate case moratorium for three years from the effective date of the new tariffs, so that none of the parties to the stipulation will file any case with the Commission, or encourage or assist in filing any case with the Commission requesting an increase or decrease in Ozark's revenues at any time prior to September 26, 2004, unless there are extraordinary circumstances that have a major effect on Ozark's intrastate operations. The Staff recommends approval of this provision because the stipulation is the result of a thorough audit of Ozark's books and it results in rates that are fair to both Ozark and its customers; it is bilateral in nature, so it will apply to requests for both rate increases and rate decreases; and it will tend to limit the cost and expense associated with rate cases which may ultimately be passed on to Ozark's customers. The Staff further notes that the provisions of the rate case moratorium will not prohibit revenue-neutral tariff filings.

Staff filed suggestions in support of the stipulation on August 15, 2001, stating that the Commission should approve it. No party responded to that pleading.

Findings of Fact, Conclusions of Law, and Decision

The Commission finds the proposed tariff is just, reasonable, and in the public interest. The proposed tariff provides for an overall revenue reduction of \$547,953,

which is about \$100,000 less than the amount that the Staff claimed in the direct testimony that it filed in the complaint case, but it is about \$194,000 greater than Ozark acknowledged to be reasonable in the rebuttal testimony that it filed in the same case; the recommended revenue reduction is a negotiated, lump-sum settlement of a number of disputed issues; Ozark will expand its local calling scope so that customers in its exchanges, which serve Noel and Southwest City, will be able to call customers in the exchanges that are served by the Goodman and Seneca Telephone Companies, which are affiliates of Ozark; local switching rate elements, for both originating and terminating rates and for both interLATA and intraLATA calls, be consolidated into a single rate; there will be specified reductions in the local switching rates, the switched transport termination rate and the switched transport facility rates; Ozark will be directed to accrue, effective October 1, 2001, depreciation expense based upon the depreciation rates for the plant accounts and subaccounts set forth in the supplement to unanimous stipulation; and the Commission will order a rate case moratorium for three years from the effective date of the new tariffs covering all parties to the stipulation.

There is no need for a hearing since no party requested a hearing. The requirement for a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. The *Deffenderfer* case held that if no party requests a hearing, the Commission may determine that a hearing is not necessary and that the Commission may make a decision based on the stipulation.¹

The Commission concludes that all issues were settled by the stipulation. The Commission has the legal authority to accept a stipulation offered by the parties as a resolution of issues raised in a case. Section 536.060, RSMo 2000, which allows parties to dispose of cases by stipulation with summary action that waives procedural requirements, states:

Contested cases...may be informally resolved by consent agreement or agreed settlement or may be resolved by stipulation, consent order, or default, or by agreed settlement where such settlement is permitted by law. Nothing contained in sections 536.060 to 536.095 shall be construed...to prevent the waiver by the parties (including, in a proper case, the agency) of procedural requirements which would otherwise be necessary before final decision, or...to prevent stipulations or agreements among the parties (including, in a proper case, the agency).

Thus, the Commission will approve the stipulation.

¹See *State ex rel. Deffenderfer Enterprises, Inc., v. P.S.C.*, 776 S.W. 2d 494, 496 (Mo. App. 1989).

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IT IS THEREFORE ORDERED:

1. That the Missouri Public Service Commission approves the unanimous stipulation and agreement filed on July 11, 2001, by Ozark Telephone Company, the Staff of the Commission, the Office of the Public Counsel, AT&T Communications of the Southwest, Inc., and Southwestern Bell Telephone Company, and whose terms are set forth in Attachment A.

2. That Ozark Telephone Company is ordered to file revised tariff sheets for service rendered on and after September 26, 2001, in compliance with the unanimous stipulation and agreement and this order no later than September 10, 2001.

3. That Ozark Telephone Company is ordered to accrue depreciation expense, effective October 1, 2001, in compliance with the unanimous stipulation and agreement and this order.

4. That, other than tariff filings that are revenue-neutral, none of the signatories to the unanimous stipulation and agreement may not file any case with the Missouri Public Service Commission, or encourage or assist in filing any case with the Missouri Public Service Commission, requesting a general increase or decrease in Ozark Telephone Company's intrastate revenues from telecommunication services prior to September 26, 2004, unless there is the occurrence of a significant, unusual event that has a major effect on Ozark Telephone Company's intrastate operations, such as an act of God; a significant change in federal or state tax laws; or a significant change in federal or state utility law or regulation.

5. That nothing in this order will be considered a finding by the Missouri Public Service Commission of the value for ratemaking purposes of the transactions, herein involved.

6. That the Missouri Public Service Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.

7. That this order will become effective on September 9, 2001.

Simmons, Ch., Murray, Lumpe and Gaw, CC., concur

Hopkins, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

**In the Matter of Southwestern Bell Telephone Company's Tariff
Filing to Introduce a Payphone Use Charge.***

*Case No. TT-2001-582
Decided August 30, 2001*

Telecommunications §14. The Commission rejected, as a violation of the price cap by which its rates are regulated, a tariff filed by Southwestern Bell Telephone Company that would have imposed a \$0.24 payphone use charge on alternately billed calls carried by Southwestern Bell that are made from payphones.

APPEARANCES

Leo J. Bub, Senior Counsel, Southwestern Bell Telephone Company, OneBell Center, Room 3518, St. Louis, Missouri 63101 for Southwestern Bell Telephone Company.

Mark W. Comley, Attorney at Law, Newman, Comley & Ruth, 601 Monroe Street, Suite 301, Jefferson City, Missouri 65101 for The Midwest Independent Coin Payphone Association.

Matthew A. Clement, Attorney at Law, Cook, Vetter, Doerhoff & Landwehr, 231 Monroe Street, Jefferson City, Missouri 65101 for The Kansas Payphone Association.

Michael Dandino, Senior Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102 for The Office of the Public Counsel and the Public.

William Haas, Deputy General Counsel, P.O. Box 360, Jefferson City, Missouri 65102 for The Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

SUMMARY

Southwestern Bell Telephone Company has submitted a tariff that would institute a payphone use charge of \$0.24 per call. The payphone use charge would apply to alternately billed calls carried by Southwestern Bell that are made from payphones. In other words, the charge would apply to calls for which the user does not deposit coins into the payphone. The Staff of the Commission and the Office of the Public Counsel oppose the imposition of the payphone use charge because they contend that it would violate the price cap under which the rates of Southwestern Bell are regulated. The Commission agrees. Southwestern Bell's tariff is rejected.

*On September 25, 2001, the Public Service Commission issued an order denying rehearing in this case.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

On March 29, 2001, Southwestern Bell Telephone Company filed a tariff that would introduce a payphone use charge of \$0.24 per call. Southwestern Bell's tariff carried an effective date of April 28, 2001. In response, on April 19, the Staff of the Commission filed a Motion to Suspend and Reject Tariff. On April 23, Southwestern Bell filed a pleading opposing Staff's motion to suspend or reject its tariff, and Staff filed its response to Southwestern Bell's pleading on April 24. On April 26, the Commission issued an order suspending Southwestern Bell's tariff for a period of 120 days beyond April 28 to August 26, 2001.

In its order suspending Southwestern Bell's tariff, the Commission also directed that any party wishing to intervene in this case should file an application to intervene no later than May 16, 2001. Timely applications to intervene were received from the Kansas Payphone Association;¹ Sprint Missouri, Inc. and Sprint Communications Company L.P.; and the Midwest Independent Coin Payphone Association.² On May 31, 2001, over the objections of Southwestern Bell, the Commission granted each of the requests for intervention.

A hearing was held on August 2, 2001. All parties appeared for the hearing except Sprint. Prior to the hearing Sprint submitted a Statement of Position indicating that it was taking no position and requesting that it be excused from participating in the hearing. Sprint's request was granted at the hearing and Sprint was excused from further participation. At the hearing, counsel for the Kansas Payphone Association appeared and asked to be excused from further participation in the hearing. That request was granted. On August 16, the Commission

¹ The application indicates that the members of the Kansas Payphone Association include: Advanced Communications; Cherokee Payphone; ComTech Systems; Coyote Call, Inc.; ETS Payphones, Inc.; Five Star Investments; John Jay Communications; K.C. Telecom Services; Lindeman Communications; Metcalf South Amoco, Inc.; Mo-Kan Public Communications; Pay Com, Inc.; Pay Phone Concepts, Inc.; Precision Communication; Riley's Full Service; Star Communications, Inc.; Tele-Connect, Inc.; Tel-Star Communications; Touch Tone Communications; Trintel Communications, Inc.; Brooks Fiber Communications of Kansas; GTE Corporation; Intl. Connector & Cable, Inc.; Opticom; and Single Source Telemanagement.

² The application indicates that the members of the Midwest Independent Coin Payphone Association include: Afford-A-Call; ANJ Communications; Community Payphones, Inc.; Illinois Payphone Systems, Inc.; Jerry Myers Phone Co.; John Ryan, and individual; JOLTRAN Communications, Inc.; Midwest Communications Solutions, Inc.; Midwest Telephone; Missouri Telephones & Telegraph; Northwest Communications, Inc.; Payphones of America North; PhoneTel Technologies; Southern Missouri Telecom; Sunset Enterprises; Tel-Pro, Inc.; and Vision Comm, Inc.

issued an order that suspended Southwestern Bell's tariff for an additional 20 days to September 15, 2001. The parties submitted briefs on August 16, 2001.

At the request of the Public Counsel, Southwestern Bell, on August 6, 2001, filed late-filed exhibit 8. On August 6, the Commission issued a notice indicating that any party wishing to make an objection to late-filed exhibit 8 must do so no later than August 10. The notice also indicated that if no objections were filed, late-filed exhibit 8 would be admitted into evidence. No objections were filed and late-filed exhibit 8 will be admitted into evidence.

Southwestern Bell has proposed a revision to its tariff that would add a \$0.24, per completed call, payphone use charge to its intrastate tariffs. Southwestern Bell has not previously included a payphone use charge in its rates. This payphone use charge would apply to any phone call placed from a payphone for which the customer does not deposit coins in to the payphone's box. For example, a customer using a payphone might use a calling card, use a credit card, bill the call to a third number, or make a collect call, rather than put coins in the payphone. Such a call is referred to as a non-sent paid call.

When a customer makes a call from a payphone without putting coins in the box, the entity that owns the payphone equipment, referred to as a payphone service provider, is not directly compensated for the use of its equipment. For that reason, federal law mandates that telecommunications carriers, such as Southwestern Bell, pay compensation to payphone service providers for non-sent paid calls that the carrier handles. Southwestern Bell has negotiated commission rates with some payphone service providers that determine the amount of compensation that will be paid to that particular provider for such calls. If no such commission rate has been negotiated, Southwestern Bell pays the payphone service provider an established default rate of \$0.24 per call. Southwestern Bell began paying per-call compensation to payphone service providers on October 7, 1997. Southwestern Bell's tariff revisions will not change the amount of compensation that it pays to payphone service providers. Rather it will permit Southwestern Bell to bill its customers to collect \$0.24 per call to reimburse Southwestern Bell for the compensation that it pays to the payphone service providers.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Southwestern Bell is a "Telecommunications Company" as that term is defined in Section 386.020(51), RSMo 2000, and is subject to the jurisdiction of the Commission pursuant to Section 386.250(2), RSMo 2000.

Section 392.230.3, RSMo 2000, grants the Commission the authority to determine, after hearing, the propriety of any rate filed with the Commission by any telecommunications company.

Section 392.230.6, RSMo 2000, provides that "at any hearing involving a rate increased or a rate sought to be increased after the passage of this law, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the telecommunications company"

47 U.S.C. §153(4) indicates that for purposes of the Telecommunications Act of 1996, Southwestern Bell is defined as a Bell operating company. 47 U.S.C. §276(a) provides that:

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any Bell operating company that provides payphone service –

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

47 U.S.C. §276(b)(1)(A) directed the Federal Communications Commission to “establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone,” In 47 C.F.R. Section 64.1300, the Federal Communications Commission implemented rules requiring every carrier to whom a completed call from a payphone is routed to compensate the payphone service provider for the call either at a rate agreed upon by the parties by contract, or a minimum default per-call compensation rate. The regulation sets the minimum-default-per-call rate at \$0.24 per call.

The Federal Communications Commission has held that carriers that pay compensation to payphone service providers are permitted, but not required, to pass all or part of those costs on to their customers.³ Therefore, Southwestern Bell’s proposed tariff is consistent with the FCC’s regulation.

However, the FCC does not have jurisdiction over the rates charged by Southwestern Bell for intrastate service. Jurisdiction over rates for intrastate service is generally reserved to state regulators.⁴ No party disputes that the Commission has jurisdiction over the rates charged by Southwestern Bell for its local services, including its payphone charges.

Section 392.245, RSMo 2000, permits the Commission to exercise its authority over the rates charged by Southwestern Bell through operation of a price cap. Section 392.245.3, RSMo 2000, caps Southwestern Bell’s rates for telecommunications services at those it charged on December 31 of the year preceding the year in which the company was first subject to price cap regulation. Southwestern Bell became subject to price cap regulation on September 16, 1997, when the Commission approved Southwestern Bell’s petition seeking to be regulated by price cap.⁵ Therefore, Southwestern Bell’s rates are capped at those it charged on December 31, 1996.

Southwestern Bell seeks to add a charge of \$0.24 per call to its rates when it completes a call made by one of its customers from a payphone. In doing so it is providing a telecommunications service for which its rates are capped. Therefore, the proposed payphone use charge exceeds the amount Southwestern Bell is permitted to charge under the price cap and must be rejected.

³ See *In the Matter of Implementation of the Pay Telephone Reclassification and Competition Provisions of the Telecommunications Act of 1996, et al.*, CC Docket No. 96-128, Report and Order, Released September 20, 1996, paragraphs 83 & 341.

⁴ See 47 U.S.C. §152(b). See also *Louisiana Public Service Comm’n v. F.C.C.*, 476 U.S. 355 (1986).

⁵ *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo Supp. 1996.* 6 Mo. P.S.C. 3d 493 (1997).

Decision

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

1a) Does the Missouri price cap statute preclude Southwestern Bell from introducing a payphone use charge?

Regulation under the price cap statute generally prevents Southwestern Bell from increasing its charges for the telecommunications services that it provides above its rates as they existed on December 31, 1996. Southwestern Bell did not impose a payphone use charge on December 31, 1996, but seeks to avoid the price cap restriction by arguing that the payphone use charge is not a charge for a service that it provides. According to Southwestern Bell, the payphone use charge is merely a pass-through charge that is really going to compensate the owner of the payphone equipment for the service of providing the payphone.

Southwestern Bell's argument misses the point. While it is not providing payphone service, it is providing the service of completing a call for its customers when that call is made from a payphone. It is for that service that its customers receive a bill, and it is to that bill that Southwestern Bell would add the proposed payphone service charge. The service that Southwestern Bell is providing, and for which it is billing its customers, has not changed since it became subject to price cap regulation in 1996.

Southwestern Bell's cost for completing calls from payphones went up when the Federal Communications Commission ordered it to pay \$0.24 per call as compensation to payphone service providers. Under traditional rate-of-return regulation, Southwestern Bell might be entitled to increase its rates to recover its increased cost of providing services, assuming that it was not over earning from other sources. However, the traditional rules do not apply to price cap regulation. Southwestern Bell is no longer entitled to pass on to its customers its increased costs of providing services.

Southwestern Bell gave up the right to pass on its increased cost of service when it gained price cap regulation. In return, it gained the benefit of having the ability to improve its efficiency and decrease its cost of service without having the Commission reduce its rates for over earning. The Commission has no way of knowing whether Southwestern Bell has reduced its cost of completing calls made from payphones by more or less than \$0.24 since price cap regulation went into effect. However, it is clear that Southwestern Bell must be held to the price cap bargain. Southwestern Bell's proposed tariff is in violation of the price cap and must be rejected.

1b) Is Southwestern Bell's payphone use charge discriminatory toward payphone service providers?

This issue was raised by the Midwest Independent Coin Payphone Association, an association of payphone service providers whose members receive compensation from Southwestern Bell for the use of their payphone equipment by persons completing calls through Southwestern Bell. No evidence was produced that would indicate that Southwestern Bell's payphone use charge would be

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discriminatory. The Association's witness, the president of the Association, testified that the Association's concerns were alleviated during the hearing. Given the fact that the Commission is rejecting Southwestern Bell's tariff for other reasons, there is no need to further address this issue.

Based on the evidence, the arguments of the parties, the Commission's Findings of Fact and its Conclusions of Law, the Commission determines that Southwestern Bell's tariff to add a payphone use charge is in violation of Southwestern Bell's price cap.

IT IS THEREFORE ORDERED:

1. That late-filed exhibit 8 is admitted into evidence.
2. That the proposed tariff sheets submitted on March 29, 2001, by Southwestern Bell Telephone Company, and assigned Tariff No. 200100997, are rejected. The tariff sheets rejected are:

P.S.C. Mo. – No. 24

5th Revised Sheet 5.12, Replacing 4th Revised Sheet 5.12

P.S.C. Mo. – No. 26

20th Revised Sheet 21, Replacing 19th Revised Sheet 21

3. This Report and Order shall become effective on September 9, 2001.

Simmons, Ch., Lumpe and Gaw, CC., concur; Murray, C., dissents, dissenting opinion attached; certify compliance with the provisions of Section 536.080, RSMo 2000.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I dissent from today's Report and Order because I respectfully disagree with the majority that the payphone use charge in Southwestern Bell Telephone Company's proposed tariff is for a service that falls under the Missouri price cap statute. The proposed charge is, rather, a new charge that allows minimal cost recovery of federally-mandated compensation to payphone service providers. It is not an increased charge for a service that the price cap company offers. Therefore, the proposed payphone use charge does not meet the definition of "rates for its services" to which section 392.245.4(5) applies.

Respectfully submitted.

Director of the Division of Manufactured Homes, Recreational Vehicles and Modular Units of the Public Service Commission, Complainant, v. Discount Manufactured Housing, Inc., Respondent.

*Case No. MC-2000-660
Decided August 30, 2001*

Manufactured Housing §§1, 2, 4, 12, 18, 19. The Director of the Division of Manufactured Homes and Modular Units of the Missouri Public Service Commission filed a complaint against Discount for altering a manufactured home to which a seal had been affixed and for failing to correct a code violation within 90 days after being ordered to do so by the Commission. Discount admitted to the violation and the parties settled.

**ORDER APPROVING NONUNANIMOUS
STIPULATION AND AGREEMENT**

This order approves the agreement filed by two of the parties.

Brief Procedural History

On April 17, 2000, the Director of the Division of Manufactured Homes and Modular Units of the Missouri Public Service Commission filed with the Commission a complaint against Discount Manufactured Housing, Inc., for altering a manufactured home to which a seal had been affixed and for failing to correct a code violation within 90 days after being ordered to do so by the Commission. On May 15, 2001, the Commission issued its order establishing a procedural schedule that included an evidentiary hearing set for July 31, 2001.

However, on July 30, 2001, the Director and Discount filed a statement of settlement, stating that they had settled the case, making the evidentiary hearing unnecessary. Director and Discount requested that the hearing be canceled and noted that the Office of the Public Counsel did not object. The Commission entered its order on July 31, 2001, canceling the evidentiary hearing and directing the parties to file, by August 14, 2001, either a stipulation and agreement or a procedural schedule.

The Stipulation and Agreement

Director and Discount filed a nonunanimous agreement on August 13, 2001. Briefly restated, the terms are:

- (a) Discount will admit that the manufactured home was altered by Discount in violation of the code and that Discount is responsible for set up, so is therefore in violation of the provisions of Section 700.025 RSMo¹;

¹References to Sections of the Revised Statutes of Missouri, unless otherwise specified, are to the revision of the year 2000.

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(b) The Director will recommend a 14-day suspension of Discount's license and Discount's inventory will have a prohibitive sales notice placed on it for the suspension period;

(c) The agreement has resulted from negotiations between the parties in consideration of the underlying facts and legal issues. If the Commission does not approve the agreement in total, it will be void and no party will be bound;

(d) The Director may submit a memorandum explaining his rationale for entering into the agreement and each party will have an opportunity to respond;

(e) The Director may provide whatever oral explanation the Commission requests;

(f) The pre filed testimony will be received into evidence; and

(g) If the Commission approves the agreement, the parties waive their respective rights to call witnesses; present oral argument and written briefs; the reading of the transcript by the Commission; and to seek judicial relief.

Thus, Director and Discount requested that the Commission issue its Order approving the terms of the agreement.

The Director's Memorandum

On August 27, 2001, the Director filed his memorandum in support of the agreement. Director's memorandum pointed out that the rationale for the Director's participation in the agreement is already set out in its entirety in that document. Therefore, since there is no further dispute between the Director and Discount, the Director requests that the Commission approve the terms of the agreement, for the reasons set forth therein. No other party filed a response to Director's pleading. Public Counsel filed no pleadings in this case.

Findings and Decision

There is no need for a hearing since no party requested a hearing. The *Deffenderfer* case held that the requirement for a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. If no party requests a hearing, the Commission may determine that a hearing is not necessary and that the Commission may make a decision based on the agreement.²

Even though one of the parties, i.e., Public Counsel, did not participate in the case, the Commission is treating the agreement as unanimous because no one has requested a hearing. Commission Rule 4 CSR 240 2.115(1) sets forth the

² See *State ex rel. Deffenderfer Enterprises, Inc. v. P.S.C.*, 776 S.W. 2d 494, 496 (Mo. App. 1989).

conditions for when the Commission may treat a nonunanimous agreement may be treated as a unanimous agreement and states:

A nonunanimous stipulation and agreement is any stipulation and agreement which is entered into by fewer than all parties and where one...or more parties requests a hearing of one...or more issues. If no party requests a hearing, the commission may treat the stipulation and agreement as a unanimous stipulation and agreement.

The Commission concludes that all issues were settled by the agreement. The Commission has the legal authority to accept a stipulation and agreement offered by the parties as a resolution of issues raised in a case. Section 536.060, which allows parties to dispose of cases by agreement with summary action that waives procedural requirements, states:

Contested cases...may be informally resolved by consent agreement or agreed settlement or may be resolved by stipulation, consent order, or default, or by agreed settlement where such settlement is permitted by law. Nothing contained in sections 536.060 to 536.095 shall be construed (1) to impair the power of any agency to take lawful summary action in those matters where a contested case is not required by law, or (2) to prevent any agency authorized to do so from assisting claimants or other parties in any proper manner, or (3) to prevent the waiver by the parties (including, in a proper case, the agency) of procedural requirements which would otherwise be necessary before final decision, or (4) to prevent stipulations or agreements among the parties (including, in a proper case, the agency).

Thus, the Commission will approve the agreement filed by Director and Discount.

IT IS THEREFORE ORDERED:

1. That the Missouri Public Service Commission approves the stipulation and agreement filed on August 13, 2001, by Discount Manufactured Housing, Inc., and the Director of the Division of Manufactured Homes, Recreation Vehicles, and Modular units of the Missouri Public Service Commission, and whose terms are set forth in Attachment A.
2. That this order will become effective on September 9, 2001.

Simmons, Ch., Murray, Lumpe and Gaw, CC., concur

Hopkins, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

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In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 Of the Telecommunications Act of 1996.*

*Case No. TO-99-227
Decided August 30, 2001*

Telecommunications § 36. The Commission granted Southwestern Bell Telephone Company's motion to lower the rates in the Missouri Interconnection Agreement (M2A).

**ORDER GRANTING MOTION TO ACCEPT
REVISED MISSOURI INTERCONNECTION RATES**

This order grants Southwestern Bell Telephone Company's (SWBT) motion to accept lowered rates in the Missouri Interconnection Agreement (M2A).

On August 16, 2001, SWBT filed a motion asking the Commission to accept modifications to the prices for unbundled network elements (UNEs) available under the M2A. The Commission previously found that the M2A, including the UNE pricing schedule, met the requirements of 47 U.S.C. Section 271(c) and that any M2A interconnection agreement adopted by a telecommunications carrier and filed with the Commission would be deemed approved by the Commission when filed. The approved agreement included prices for UNEs that the Commission had established in its Case No. TO-97-40.¹ Following the Commission's approval of the M2A, numerous competitive local exchange carriers (CLECs) adopted the agreement.

SWBT now requests that the Commission accept revisions to the Appendix Pricing UNE Schedule of Prices and corresponding revisions to Attachment 12: Compensation and Attachment 25: xDSL of the M2A. The revisions proposed by SWBT are generally described by SWBT as follows:

(1) recurring loop rates were reduced an average of 10%, with greater reductions for two wire analog loops in the rural zone and no reduction for two wire analog and digital loops in the urban zone, (2) a reduction of 18.5% for recurring local switching and tandem switching rates, (3) an average reduction of 18.5% on recurring blended transport, common transport and certain dedicated transport rates, (4) a reduction of 18.5% on recurring charges for SS7 transport and STP port per port and (5) a 95.7% reduction in the non-recurring charge for analog line ports.

*Please see pages 69, 73, 117, 150, and 409 for other orders in this case. In addition, see page 181, Volume 9 MPSC 3d, for another order in this case.

¹ *In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company.*

The Commission scheduled an on-the-record presentation on August 16, 2001, at which SWBT further described the proposed rate changes.

Several CLECs have asked the Commission to reconsider its first recommendation to the FCC and to hold additional evidentiary hearings before making a recommendation on SWBT's second application filed on August 20, 2001. Several parties also raised concerns that the prices were not being reduced enough. Those parties suggested to the Commission that the prices should be reduced to the same level as the prices offered by SWBT to its competitors in the states of Arkansas and Kansas. No party, however, objected to the prices being lowered.

NuVox Communications, Inc., filed a reply in which it requested that the Commission make the rate reductions retroactive to the date each CLEC adopted the M2A. NuVox also suggested that the Commission order SWBT to extend the terms of the contract for an additional three years beyond its current expiration date of March 5, 2002.

SWBT responded to NuVox on August 27, 2001. SWBT stated that in its opinion the proposed rates could not be applied retroactively. SWBT also reiterated that it has made the commitment to the Commission that if its application is approved by the FCC, it will extend the terms of the M2A. SWBT stated that no action is needed by the Commission on that point.

The Staff of the Missouri Public Service Commission filed suggestions to the Commission on August 28, 2001. In its suggestions, Staff stated it had reviewed the proposed M2A rates, and that the rates are lower than those rates the Commission has previously found to meet the requirements of 47 U.S.C. Section 271. Staff stated that the revisions will not affect SWBT's compliance with 47 U.S.C. Section 271. Thus, Staff recommended that the Commission approve the revised rates.

The Commission may only reject a negotiated interconnection agreement if it finds that the agreement is discriminatory to a telecommunications carrier that is not a party to the agreement, or if "the implementation of . . . [the] agreement . . . is not consistent with the public interest, convenience, and necessity."² The Commission has already approved the rates, terms, and conditions offered in numerous interconnection agreements identical to the M2A. The amendments to UNE prices as proposed by SWBT are reductions in the prices its competitors will have to pay for certain UNEs. These amendments will have no effect on the Commission's previous findings that this agreement is not discriminatory and is in the public interest. Therefore, the Commission determines that the CLECs should be given the opportunity to benefit from these reduced rates. The Commission does not find, however, that these prices should be made retroactive; rather, SWBT should offer these reduced prices as amendments to the interconnection agreements currently active and should do so as expeditiously as possible. SWBT should also make the lowered prices available as part of the M2A for adoption by other CLECs.

NuVox suggests that the Commission should order SWBT to extend the terms of the M2A for an additional three years. NuVox does not, however, cite any authority

² 47 U.S.C. § 252(e)(2)(A).

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on which the Commission may take such an action. SWBT has made a commitment to this Commission in its pleadings and motions and at the most recent on-the-record presentation that if its application for in-region interLATA authority is approved by the FCC, it will extend the terms of the M2A for an additional three years. Therefore, the Commission will rely on those statements of SWBT and finds no need to address that issue further.

IT IS THEREFORE ORDERED:

1. That the amendments proposed to the Appendix Pricing UNE Schedule of Prices, Attachment 12: Compensation, and Attachment 25: xDSL, attached as Exhibits A, B, and C to the Motion of Southwestern Bell Telephone Company for Approval of Revised Missouri 271 Interconnection Agreement Rates filed on August 16, 2001, are found to meet the requirements of 47 U.S.C. Section 271(c).
2. That any amendment to a currently approved Missouri Interconnection Agreement (M2A) or any future agreement adopted and filed with the Commission containing the same terms and conditions including these amendments, shall be deemed approved by the Commission when filed.
3. That this order shall become effective on September 9, 2001.

Simmons, Ch., Murray, and Lumpe, CC., concur.
Gaw, C., concurs, with separate concurring opinion attached.

Dippell, Senior Regulatory Law Judge

CONCURRING OPINION OF COMMISSIONER STEVE GAW

I concur in the result of the majority opinion in that the rates charged by Southwestern Bell Telephone Company to Competitive Local Exchange Companies under the TO-97-40 case will be reduced. However, I believe this reduction should be ordered only because the rates are lower than those approved by this Commission in the TO-97-40 case.

Having not been a member of this Commission when a decision in that case was rendered nor when the Commission recommended that SWBT enter the long distance market, I cannot say that either the initial TO-97-40 rates nor the new rates offered by SWBT meet the requirements of 47 USC § 271. Nor do I believe that the Commission should infer that it believes that the new rates are the appropriate rates as of August 30, 2001.

This Commission has heard no evidence as to the appropriateness of these rates as of the date of this order. It can only say that the rates are lower and thus deductively better for competition than rates approved in a previous case.

If this case were about modifying a child support order and increasing the amount of support to a custodial parent from a previous order, it could easily be presumed that such an increase would be beneficial to the custodial parent. However, I know of no judge who would enter a new order adjusting the support that the non-custodial parent proposed without the custodial parent's agreement or hearing evidence that the amount was the correct amount, considering all appropriate facts.

The parties in this case do not object to the lower rates. However, they have not agreed that the lower rates are low enough nor has this Commission made any updated inquiry into that issue. What we do know is that the rates volunteered to Missouri are higher than Texas and Kansas. More striking, Missouri's rates are higher than the rates just volunteered by SWBT to Arkansas - a state that is more rural and with more difficult terrain than Missouri. These are important factors in the differences in prices, according to Counsel for SWBT.

This Commission should do further inquiry into the rates in the TO-97-40 case and allow all parties to be heard on the appropriateness of the TO-97-40 prices. This Commission should continue to inquire and demand an explanation for the reason that Texas, Kansas, and, most particularly, Arkansas have lower prices than Missouri. I hope that the order entered by the Commission today does not mean that this Commission is abandoning that inquiry.

In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996.*

*Case No. TO-99-227
Decided September 4, 2001*

Telecommunications §1. The Commission denied the motions to reconsider the Commission's recommendation to the Federal Communications Commission (FCC) and designated the case as "open" for an indefinite period in order to monitor Southwestern Bell Telephone Company's performance under the Missouri 271 Interconnection Agreements (M2A) and the Performance Remedy Plan.

Telecommunications §1. The Commission determined that even though the voluntary price reductions made to the Missouri 271 Interconnection Agreements (M2A) were not further reduced to the levels that Southwestern Bell Telephone Company's customers in the states of Arkansas and Kansas received, there was no new issue with regard to the pricing of unbundled network elements that would cause the Commission to reconsider its previous recommendation to the Federal Communications Commission.

Telecommunications §1. The Commission found that prices set in Case No. TO-98-40 were found in that case to be TELRIC compliant, and that lowering those rates could not logically be considered discriminatory to the competitive telecommunications companies in the current case.

*Please see pages 69, 73, 117, 150, 409 and 429 for other orders in this case. In addition, see page 181, Volume 9 MPSC 3d, for another order in this case.

**ORDER DENYING MOTIONS TO RECONSIDER RECOMMENDATION
AND OPENING CASE FOR MONITORING PURPOSES**

This order denies the motions to reconsider the Commission's recommendation to the Federal Communications Commission (FCC) and opens this case indefinitely for monitoring of Southwestern Bell Telephone Company's performance under the Missouri 271 Interconnection Agreements (M2A) and the Performance Remedy Plan.

On March 15, 2001, the Commission issued its final recommendation after an extensive inquiry into Southwestern Bell's¹ compliance with the 14-point checklist in 47 U.S.C. § 271(c). In its recommendation, the Commission supported Southwestern Bell's application for in-region interLATA authority within the state of Missouri. The Commission issued a Notice Closing Case on April 2, 2001, which "closed" the Commission's official case file for administrative purposes. Southwestern Bell filed its application with the FCC on April 4, 2001. The Commission subsequently filed its comments with the FCC and recommended that the FCC approve Southwestern Bell's application. On June 7, 2001, however, Southwestern Bell withdrew its application at the FCC. Southwestern Bell cited concerns raised by the United States Department of Justice and a recent appellate court decision² as its reasons for withdrawing its application.

On June 27, 2001, the Office of the Public Counsel filed a motion with the Commission. In its motion, Public Counsel requested that the Commission "reopen" its case file, reconsider its evaluation of Southwestern Bell's application, and reconsider its recommendation to the FCC. Public Counsel requested that the Commission hold additional evidentiary hearings and allow all the parties to supplement and update the record "in anticipation of the refiling of . . . [Southwestern Bell's] application." Public Counsel expressed concerns that the procedures at the FCC would be unable to address adequately and fairly the positions of the intervening and commenting parties to Southwestern Bell's refiled application.

On June 28, 2001, McLeodUSA Telecommunications Services, Inc., concurred in Public Counsel's motions. McLeod speculated that Southwestern Bell would refile its application with the FCC and that the application would contain "quite significant and highly relevant" information that had not been previously considered by the Missouri Commission. McLeod alleged performance problems with UNE-P and unbundled loop provisioning. McLeod also alleged "significant problems with SWBT's LMOS database." Finally, McLeod argued that inaccuracies in the affidavits filed by Southwestern Bell in other state's Section 271 proceedings should cause Missouri to question the information it presented to the Missouri Commission.

¹ Southwestern Bell Telephone Company is the wholly owned subsidiary of Southwestern Bell Communications, Inc. For ease of reference they are both referred to as "Southwestern Bell."

² *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (mandate issued March 6, 2001). This decision is hereinafter referred to as the ASCENT decision.

AT&T Communications of the Southwest, Inc., also filed a motion to reopen the proceeding on June 28, 2001. AT&T asked the Commission to reopen its proceeding or to open a new case in order to examine problems with the LMOS database and the reported flow through rates for competitive local exchange carrier orders submitted using the EDI and LEX interfaces. AT&T reported that the Public Utilities Commission of Texas had begun an audit of the LMOS data and flow-through issues and that each of the state commissions in Southwestern Bell's region were encouraged to participate. AT&T expressed its concerns that affidavits filed in the Kansas and Oklahoma proceedings contained information about the LMOS database which Southwestern Bell has since admitted to the FCC was inaccurate. AT&T indicates that this same information was relied on by the Missouri Commission in making its final recommendation to the FCC.

NuVox Communications of Missouri, Inc., the MCI WorldCom companies,³ Sprint Communications Company, L.P., and Ionex Telecommunications, Inc., also filed motions requesting the Commission to reopen and reconsider its recommendation to the FCC. Each of these competitive companies expressed similar concerns with regard to Southwestern Bell's anticipated second application to the FCC. NuVox also expressed certain performance concerns that were raised during the Commission's review of Southwestern Bell's compliance with the 14-point checklist.

The MCI WorldCom companies and NuVox jointly filed a supplemental motion on July 27, 2001. The supplement highlighted that the current terms of the M2A will expire in March of 2002.

The Staff of the Missouri Public Service Commission filed its response to the motions of Public Counsel and McLeod on June 28, 2001. Staff supported the motions of Public Counsel and McLeod "for the purpose of reviewing any new evidence upon which SWBT and its affiliated companies intend to rely in presenting their application to the FCC for § 271 authority in Missouri." Staff also supported reopening this case, or opening a new case for the purpose of continued monitoring of Southwestern Bell's compliance with 47 U.S.C. § 271 and the Performance Remedy Plan in Attachment 17 of the approved Missouri 271 Interconnection Agreement (M2A).

Staff also stated that it anticipated Southwestern Bell filing a second application with the FCC that would include substantial changes to the M2A. Because the Commission relied heavily on the M2A in recommending approval of Southwestern Bell's first application, Staff recommended that the Commission review any modifications to the M2A before making further recommendations to the FCC. Staff stated, however, that it believed the requests for evidentiary hearings to be premature when filed.

On July 3, 2001, Southwestern Bell responded to the motions to reopen the case. Southwestern Bell argued that the competitive companies will have a chance to make all their arguments to the FCC after Southwestern Bell refiles its request

³ The MCI WorldCom companies include MCI WorldCom Communications, Inc., MCI WorldCom Network Services, Inc., MCImetro Access Transmission Services, LLC, and Brooks Fiber Communications of Missouri, Inc.

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for in-region interLATA authority in Missouri. Southwestern Bell indicated that the only result of the Commission reconsidering its previous recommendation would be unnecessary delay. Southwestern Bell argued that the performance measure issues were more appropriately addressed in the six-month review process as set out in the Performance Remedy Plan, thus allowing the collaborative process to work. Southwestern Bell argued that the issues surrounding the ASCENT decision would also be more appropriately addressed by the FCC. Southwestern Bell also argued that when similar applications were withdrawn by it for the state of Texas and by Verizon for the state of Massachusetts, neither of those state commissions reopened their proceedings to collect additional evidence.

On August 20, 2001, Southwestern Bell refiled its application with the FCC for authority to provide in-region interLATA telecommunications services in the state of Missouri. Southwestern Bell filed this application jointly with its application for the state of Arkansas.

The Commission previously reviewed requests to direct Southwestern Bell to include Missouri data in the Texas LMOS audit and issued an order granting those requests on August 28, 2001. In addition, the Commission directed Southwestern Bell to come to the Commission and make a presentation regarding its intent to file a second application with the FCC and any changes from its first application that would be included in the second application. Southwestern Bell made a presentation to the Commission and responded to Commission questions on August 16, 2001. Southwestern Bell explained the LMOS database issue and the reduced prices it intended to offer as part of the M2A.

Also on August 16, 2001, Southwestern Bell filed a motion with the Commission asking the Commission to approve reduced rates for unbundled network elements in the M2A. The reductions were to certain prices previously found to be TELRIC-compliant in the Commission's Case No. TO-97-40.⁴ The Commission reviewed the reductions and approved their inclusion in the M2A on August 30, 2001.

After the August 16, 2001, oral presentation by Southwestern Bell, additional comments were filed by Sprint, AT&T, and Public Counsel. Sprint again argued that the Commission should reopen the proceedings to consider the effects of the ASCENT decision. Each of the moving parties argued that the Commission should investigate further Missouri prices as compared to the states of Kansas and Arkansas. AT&T also continued to argue that the LMOS database issue raises sufficient questions of fact for the Commission to reopen this case for additional evidentiary hearings. Each of the commenting parties admitted that the lowering of prices was a "step in the right direction."

Staff filed additional suggestions to the Commission on August 28, 2001. In its suggestions, Staff advised the Commission that "Southwestern Bell's overall performance measurement results have steadily improved." Staff specifically noted that the performance measurements since the approval of the M2A are the "highest success ratios . . . to date." Staff also related information about unsuc-

⁴ *In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company.*

cessful performance of Southwestern Bell but indicated that Southwestern Bell had complied with the terms of the Performance Remedy Plan by paying a penalty to the state treasury. Staff highlighted other areas of Southwestern Bell's performance for previously criticized PM-58-06, PM-62-06, and PM-68-05. Staff stated that Southwestern Bell achieved parity for May, June, and July for PM-58-06 and PM-68-05. Staff stated that Southwestern Bell achieved parity in June for PM-62-06 and that for May and July there was sufficient data to calculate definitive results.

Staff stated that it had investigated Southwestern Bell's statement that its affiliate, SBC-Advanced Solutions, Inc., has entered into interconnection agreements with Logix Communications Corporation and DSLnet Communications, LLC, for the provisioning of advanced services in order to comply with 47 U.S.C. § 251(c) and the ASCENT decision. Those agreements were approved by the Commission in its Case Nos. TO-2001-481 and TO-2001-667. One other interconnection agreement between Southwestern Bell and IG2, Inc., is pending at the Commission in Case No. TO-2002-45. Staff concluded after its investigation of the status of these interconnection agreements that the Commission should not withdraw its support of Southwestern Bell's application based on Southwestern Bell's compliance with the ASCENT decision.

Staff summarized the current status of the three pending cases which will determine the permanent prices for the M2As.⁵ In addition, the Commission has a collocation tariff case pending⁶ in which the parties have reached a unanimous stipulation and agreement as to the rates, terms and conditions. Staff stated that in its opinion there was no change in circumstances that necessitated the reconsideration of the Commission's original recommendation to the FCC.

When the motions to reopen this case were filed the competitive companies were purely speculating about what information would be included in Southwestern Bell's second application with the FCC. What was clear was that Southwestern Bell had chosen to withdraw its original application in order to address concerns of the FCC, and therefore, the process by which Southwestern Bell must abide to be granted authority to provide in region interLATA telecommunications service in Missouri, was working.

The Commission has spent more than two years evaluating and monitoring Southwestern Bell's performance with regard to the 14-point checklist as found in Section 271 of the Telecommunications Act of 1996. The Commission has taken recent actions to ensure continued monitoring of Southwestern Bell's performance since the approval of the M2A by requesting that Missouri data be included in the LMOS audit in Texas. Southwestern Bell has also voluntarily reduced many of its

⁵ Case No. TO-2001-438, *In the Matter of the Determination of Prices, Terms, and Conditions of Certain Unbundled Network Elements*; Case No. TO-2001-439, *In the Matter of the Determination of Prices, Terms, and Conditions of Conditioning for xDSL Loops*; and Case No. TO-2001-440, *In the Matter of the Determination of Prices, Terms, and Conditions of Line Splitting and Line Sharing*.

⁶ Case No. TT-2001-298, *In the Matter of Southwestern Bell Telephone Company's Proposed Tariff, PSC Mo. No. 42 Local Access Service Tariff, Regarding Physical and Virtual Collocation*.

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prices for unbundled network elements in the state of Missouri. The Commission expects that soon those prices will be incorporated into the numerous interconnection agreements already adopted in Missouri. In addition, Southwestern Bell has assured the Commission that it intends to exercise its option and extend the terms of the M2A to March 5, 2005, upon approval of its 271 application by the FCC.

While the Commission notes that the voluntary price reductions made to the M2A were not further reduced to the levels that our sister states of Arkansas and Kansas received, the Commission determines that there is no new issue with regard to the pricing of unbundled network elements that would cause it to reconsider its previous recommendation. The fact still remains that this Commission has determined TO-97-40 prices to be TELRIC-compliant, and lowering those rates cannot logically be considered discriminatory to the competitive companies.

As to the performance of Southwestern Bell, the Commission finds that this case should remain open for the purpose of continued monitoring of Southwestern Bell's compliance with 47 U.S.C. § 271 and the Performance Remedy Plan in Attachment 17 of the approved Missouri 271 Interconnection Agreement (M2A).

Therefore, the Commission will direct its Records Department to make the administrative designation of "open" on this case file until the Commission orders otherwise. In addition, the Commission will direct its Staff to file periodic reports in this case regarding Southwestern Bell's continued performance. The reports should include, but not be limited to the results of the six-month performance reviews, any penalties paid to the state treasury as a result of the Performance Measures Plan, recommendations for reductions of performance measures, and the results of the LMOS database audit in the state of Texas.

The Commission recognizes the benefits that additional competition in interLATA telecommunications services will bring to the state of Missouri. Given the Commission's continued monitoring, the improved performance of Southwestern Bell since the competitive companies have been operating under the M2As in Missouri, the fact that the Commission is working diligently to determine the appropriate long-term rates, subject to true-up, where those rates had not previously been set, and the fact that the M2A rates will now be lower than previously offered, the Commission finds no new information sufficient to reconsider its previous recommendation. The Commission continues to support Southwestern Bell's application for in-region interLATA authority.

IT IS THEREFORE ORDERED:

1. That the motions of the Office of the Public Counsel, AT&T Communications of the Southwest, Inc.; NuVox Communications of Missouri, Inc.; MCI WorldCom Communications, Inc.; MCI WorldCom Network Services, Inc.; MCI Metro Access Transmission Services, LLC, and Brooks Fiber Communications of Missouri, Inc.; Sprint Communications Company, L.P.; and Ionex Telecommunications, Inc., to reconsider the Commission's previous recommendation by reopening the case are denied.
2. That the Missouri Public Service Commission continues to support the application of Southwestern Bell for authority to provide in-region interLATA telecommunications service within Missouri.
3. That this case shall remain open for administrative purposes and for the continued receipt of periodic reports from the Staff of the Missouri Public Service Commission regarding

Southwestern Bell's continued performance. The reports should include but not be limited to the results of the six-month performance reviews, any penalties paid to the state treasury as a result of the Performance Remedy Plan, recommendations for reductions of performance measures, and the results of the LMOS database audit in the state of Texas.

- 4. That all motions not previously ruled on are denied and all objections not previously ruled on are overruled.
- 5. That this order shall become effective on September 14, 2001.

Simmons, Ch., Murray and Lumpe CC., concur Gaw, C., not participating

Dippell, Senior Regulatory Law Judge

**In the Matter of the Application of Union Electric Company, d/b/
a AmerenUE, for an Order to Approve a Change to the
Single-Phase Meter Testing Standard Under Which
AmerenUE Currently Performs Its Single-Phase Meter Test-
ing.**

*Case No. EO-2001-521
Decided September 11, 2001*

Electric §§2, 31, 33. The Commission granted Union Electric Company d/b/a AmerenUE a variance of Commission Rule 4 CSR 240 10.030(28), to continue its sampled meter testing program, implementing the American National Standard Institute Sampling Procedures and Tables for Inspection by Attributes and by Variables (ANSI Standards) as a basis for its sample meter testing procedure.

ORDER GRANTING VARIANCE

This order grants Union Electric Company d/b/a AmerenUE a variance of Commission Rule 4 CSR 240 10.030(28), to continue its sampled meter testing program, and granting AmerenUE permission to adopt the ANSI Standards as a basis for its sample meter testing procedure. AmerenUE filed an application for variance with the Missouri Public Service Commission requesting approval to change its statistical sample-meter-testing standard on March 30, 2001.

In its application for variance, AmerenUE reported that it had previously sought and was given permission to depart from certain requirements of Rule 32 of the Commission's General Order No. 20 (a variance) regarding the testing of electric service watt-hour meters on March 12, 1975. That rule required that every electrical service watt-hour meter in Missouri be periodically tested by the electric corporation furnishing the meter. AmerenUE was authorized to utilize a standardized statistical sampling technique that incorporated the mathematical principles of Statistical Quality Control as set forth in published standards of the United States Military establishments and other governmental agencies (MIL Standards). AmerenUE

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stated that the testing schedules required previously under Rule 32 are now codified in Commission Rule 4 CSR 240 10.030(28).¹

On March 30, 2001, AmerenUE filed its request for variance to change its single-phase watt-hour meter statistical sample-testing standard. AmerenUE requested approval to change from the MIL Standards currently used by AmerenUE as a means of testing the company's single-phase watt-hour meters to the American National Standard Institute Sampling Procedures and Tables for Inspection by Attributes and by Variables (ANSI Standards). AmerenUE stated that the ANSI Standards are essentially a modernization of the MIL Standards. AmerenUE further stated that the company's testing procedure will remain the same in all other aspects as approved by the Commission in its March 12, 1975 order. AmerenUE further stated that the change from the MIL Standards to the ANSI Standards will not result in any additional cost to its electric customers, will not result in the reduction of meters tested and will not change the accuracy of the meter testing procedures.

AmerenUE stated that, in connection with the Illinois restructuring legislation, it was required to update its electric meter testing procedures in Illinois to incorporate the ANSI Standards. AmerenUE stated that employing the same testing procedures in both of the company's jurisdictions will reduce the administrative burdens of having to maintain and track two separate, but statistically identical, meter testing programs.

AmerenUE noted that the Commission had approved use of the ANSI Standards by other companies. AmerenUE also stated that the Commission approved its request to use the ANSI Standards as a basis for its natural gas meter testing program on November 12, 1997, in Case No. GO-98-25. AmerenUE indicated that the change from MIL Standards to the ANSI Standards will not have any impact on the procedure used by the company for testing meters upon the receipt of a customer complaint.

On August 29, 2001, the Staff of the Commission filed its response recommending that the Commission grant AmerenUE's request to continue sampled meter testing but to adopt the ANSI Sampling Procedures and Tables for Inspection by Attributes and by Variables² for selecting the number of meters to be tested in lieu of the Commission-authorized sampling criteria that AmerenUE is presently using.

Staff stated that sampled testing of meters is utilized to ensure the accuracy of the meters as a whole. Staff noted that AmerenUE recently converted to automatic meter reading, which required the placement of modules in meters and the testing and replacement of many of AmerenUE's existing meters. As a result, Staff indicated that AmerenUE now has a more homogenous group of meters in service across its system, which have recently been tested for accuracy. Staff also confirmed that each customer is allowed to verify the accuracy of their own meter by requesting the meter be tested at no charge, provided that the meter has not been

¹ Code of State Regulations, Effective May 16, 1968.

² ANSI/American Society for Quality Control (ASQC) Z1.4 and ANSI/ASCQ Z1.9.

tested within the last 12 months.³ Staff stated that it has reviewed both the statistical sampling and testing procedures to test the accuracy of the electrical meters that AmerenUE now uses and the new proposed testing procedures. Staff recommended the Commission approve AmerenUE’s request to continue sample meter testing and to change its sampling method to the ANSI Standards.

The Commission has reviewed the application and Staff’s recommendation. The Commission finds that, for good cause shown, AmerenUE’s application to amend its variance, which is now a variance from Commission Rule 4 CSR 240-10.030(28), should be granted. Therefore, AmerenUE will be granted a variance to continue using sample meter testing, and to adopt the ANSI Standards as a basis for its single-phase, watt-hour meter testing procedure.

IT IS THEREFORE ORDERED:

- 1. That the application filed by Union Electric Company d/b/a AmerenUE on March 30, 2001, is granted.
- 2. That this order shall become effective on September 21, 2001.
- 3. That this case may be closed after September 22, 2001.

Simmons, Ch., Murray, Lumpe, and Gaw, CC., concur.

Register, Regulatory Law Judge

**In the Matter of AT&T Communications of the Southwest, Inc.’s
Proposed Tariff to Establish a Monthly Instate Connection
Fee and Surcharge.**

*Case No. TT-2002-129
Decided September 13, 2001*

Evidence, Practice and Procedure §§2, 4. Telecommunications §7. Under Section 392.230(3) RSMo, the Commission has the discretionary authority to suspend, for 120 days plus six months, the effective date of a tariff for a new rate, rental, or charge. The Commission finds that, in order to allow more time to study the effect of the proposed tariff, it should be suspended under this statute.

ORDER SUSPENDING TARIFF

This order suspends the proposed tariff filed by AT&T.

On September 4, 2001, the Office of the Public Counsel filed with the Missouri Public Service Commission its motion to suspend and reject the proposed tariff sheets of AT&T Communications of the Southwest.

³ Commission Rule 4 CSR 240-10.030(29).

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Public Counsel's motion contained the following points:

- (1) The proposed tariff establishes a \$1.95 monthly service charge known as an "instate connection fee" for AT&T customers who are presubscribed to AT&T for interLATA service. The surcharge is, in effect, a discriminatory rate increase for certain customers;
- (2) Any AT&T customer who uses more than \$1.00 in long distance calls or is billed for other services of \$1.00 or more is charged the \$1.95. Customers who have selected AT&T for their carrier for 1+ interLATA toll are penalized for being loyal to AT&T. Customers subject to the tariff are charged a different rate for the same service enjoyed by other AT&T presubscribed interLATA customers. The charge does not represent any additional services provided to those customers subjected to the "instate connection" charge;
- (3) The proposed tariff results in an unreasonable and unjust rate. The tariff assesses a surcharge for "instate connection" each month conditioned on some measure of usage (at least \$1.00 in long distance charges). However, the surcharge can be assessed even if a customer makes no toll calls, but is billed for some fee in excess of \$1.00; for example, a monthly service fee or a monthly minimum usage fee of \$4.95. Apparently, the surcharge would apply if the customer is charged \$1.50 as a separate AT&T billing charge for having the AT&T charges included on the local exchange carrier bill. It is unclear whether the surcharge is triggered by the Federal Access Charge, Presubscribed Interexchange Carrier Charge, or Universal Service Fund Charge;
- (4) AT&T has failed to disclose the basis for singling out these customers for discriminatory treatment and extra charges. Public Counsel had to investigate AT&T's website to discover that the company's basis for the surcharge is AT&T's contention that Missouri has excessive access charges. The purpose of access charges is to compensate the local exchange carriers for the use of the local network in completing a toll call. These charges have a long history and the interexchange carriers have incorporated this cost factor and element into their rates. The competitive marketplace determines to what extent the carrier will seek to recover all or any part of those costs in its rates. By separating this cost element from the normal rate structure, AT&T distorts the competitive toll rate structure. It also seeks to recover this cost twice and without regard to customer actual usage or costs by charging a

separate, additional surcharge to certain customers for access costs;

(5) The additional surcharge is a rate increase which unfairly inflates the per minute rate charged by AT&T. The resulting effective rates are unreasonable and unjust;

(6) The tariff is vague because: (a) the tariff fails to provide whether "long distance" for the purposes of the surcharge includes intraLATA toll calls, interLATA tolls, intrastate toll, interstate tolls, or international tolls; (b) the tariff is not clear whether a triggering charge would include universal service fund, portability charges, calling card charges, and other charges; and (c) the scope of the charge is not stated so the customer will not be fairly apprised of the basis of the charge;

(7) The notice sent to customers is inadequate and misleading. It does not clearly define the condition under which the customer will be charged the surcharge. It does not advise the consumer how to avoid the surcharge;

(8) In case number TO-99-596, *In re Competitive Local Exchange Telecommunication Companies*, June 13, 2000, the Commission set out the scope of its jurisdiction and duty: Chapter 392 "provides that the purpose of the chapter is to '[p]ermit flexible regulation of competitive telecommunications companies and competitive telecommunications services[.]'" Additionally, Section 392.200.4(2), RSMo Supp. 1999, declares that "[i]t is the intent of this act to bring the benefits of competition to all customers[.]"; and

(9) Just because AT&T is offering competitive services does not mean that its customers should be fair game for unreasonable and unjust rates under the guise of surcharges for a vague service called "instate connection." Customers are not clearly made aware of the conditions which subject them to a surcharge so they can determine whether the surcharge is properly applied. The surcharge increases the effective rates for AT&T service, but on a selective basis. The public interest is not served by allowing the surcharges to go into effect without an examination into whether the rates and surcharges are proper, reasonable, and just.

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Public Counsel filed the motion under Sections 392.200, and 392.185, RSMo 2000,¹ which it says provides the statutory basis for the Commission to review and suspend the tariff. In addition, under Section 392.185, the Commission, according to Public Counsel, has broad power to protect consumers even if the telecommunications provider is a competitive company and is providing a competitive service. According to Public Counsel, the Commission's oversight and authority to suspend is an essential power of the Commission to carry out the legislative purpose of Chapters 386 and 392, RSMo.

Thus, Public Counsel requested that the Commission suspend the tariff and set the matter for an evidentiary hearing. In addition, Public Counsel requested that the Commission hold a public hearing on the proposed tariff, given the broad impact the tariff has on so many Missouri toll customers in many parts of the state.

On September 6, 2001, the Commission ordered that any party wishing to respond to Public Counsel's motion should do so by September 7, 2001.

On September 7, 2001, the Staff of the Commission filed its response, which contained the following points:

- (1) The Commission has granted AT&T competitive status as a provider of competitive telecommunications service. As a competitive company, AT&T must adhere to the requirements of Section 392.500.2, which permits increases in rates with a tariff filing and notice to customers at least ten days prior to the implementation. In this case, AT&T has complied with the statutory requirements;
- (2) The Commission does not typically scrutinize the rate structure of competitive long distance service providers beyond compliance with a few limited rate requirements identified in Missouri statutes. Statutes permit a distinction in the treatment of competitive and strictly regulated entities. Section 392.185.5 permits flexible regulation of competitive telecommunications companies and competitive telecommunications services, and Section 392.185.6 allows full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest. Nothing in Public Counsel's motion indicates that the proposed service charges reach the threshold to warrant Commission intervention to regulate the charging and billing structure of a competitively classified company;
- (3) Customers have the ability to switch service providers. Over 600 long distance companies currently hold Commission certificates to provide service in Missouri, so custom-

¹References to Sections of the Revised Statutes of Missouri, unless otherwise specified, are to the revision of the year 2000.

ers can always change to one that does not apply this surcharge. For example, a minimum of 74 carriers serve with 1+ service in each Southwestern Bell Telephone Company exchange in Missouri. In short, if customers feel they are being "penalized" by remaining with AT&T for their service, they can choose to switch carriers;

(4) Public Counsel has suggested that the Commission did not receive a copy of the notice provided to customers as part of the tariff filing. In fact, a copy was included with the filing and was attached to Staff's response as Exhibit A. Public Counsel also suggests that the notice was inadequate, but Staff notes that it provides a toll free number for the customer to call and a web site address for further information, and clearly states that AT&T will incorporate a \$1.95 service charge each month for customers who spend more than \$1.00 a month;

(5) Staff does not believe the charges are discriminatory. The service charge applies equally to all AT&T customers who use more than a dollar a month in service. The only customers who are exempted are low-volume and low-income customers, and AT&T's local customers. There is no indication that the USF will trigger the charges, as voiced in Public Counsel's motion, and Staff also notes that line subscriber charges are billed by local exchange carriers, not AT&T, and thus also would not trigger the charges. Rather than viewing the case from the perspective that all users of \$1.00 or more in AT&T phone service are a special class being discriminated against through the tariff, a more appropriate way to consider the case is that all AT&T customers are subject to the charge except those who do not use the service or who are local customers, and thus do not generate the charges AT&T seeks to recover through the tariff in the first place; and low-income customers who traditionally can be exempted from charges applied to the general consumer; and

(6) Staff observes that monthly recurring charges and surcharges are common in the industry, and would suggest that AT&T should not be singled out for special treatment by the Commission or the Public Counsel based on AT&T's tariff filing.

Also on September 7, 2001, AT&T filed its response, which contained the following points:

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(1) On September 4, 2001, the Public Counsel filed a motion to suspend AT&T's proposed tariff. In its motion, Public Counsel did not contest that, as a competitive telecommunications company offering competitive services, AT&T has the authority to assess the proposed charge on AT&T's customers. Instead, Public Counsel cobbled together three disingenuous arguments against the proposed tariff. Those arguments are that the proposed charge is discriminatory; AT&T did not provide adequate customer notice; and the charge is unreasonable and unjust;

(2) AT&T opposes each of these assertions on the grounds that they are completely erroneous and unsupportable;

(3) AT&T is classified as a competitive telecommunications company. As such, AT&T's rates are subject to a lesser degree of regulatory scrutiny in recognition that there is adequate competition to replace regulation. As a competitive company, Section 392.500(2) governs AT&T's ability to increase rates. That section requires AT&T to file the proposed rate with the Commission and provide notice to all potentially affected customers. There can be no credible dispute that AT&T has complied with both requirements of this section. Therefore, Public Counsel's motion must be denied and the proposed rate permitted to go into effect. While this is sufficient reason to deny Public Counsel's motion, AT&T will nevertheless respond to Public Counsel's allegations rather than be construed as acquiescing;

(4) Contrary to Public Counsel's assertions, AT&T's proposed charge is not discriminatory. As the customer notice clearly indicates, any customer who incurs more than \$1.00 per month in billable charges by AT&T, will be charged the In-State Connection Fee. The only exceptions are customers who generate less than \$1 in billable charges, customers participating in a Lifeline or Federal Price Protection plan, or interexchange customers who are also local customers of AT&T telephony services. AT&T exempted customers who generate less than \$1 in billable charges, or customers participating in a Lifeline or Federal Price Protection plan, in part because of past assertions that assessing minimum usage charges on low- or no-volume customers as well as low-income customers was "unfair." It is almost certain that if AT&T had chosen to apply the charge to all presubscribed customers, Public Counsel would now be before the Commission contending that assessing the In-state Connection Fee on low- or no-volume customers and low-income customers was "unfair";

(5) AT&T's waiver of these charges to low- or no-volume customers or low-income customers is similar to a LEC's LifeLine services, which provide local service at reduced rates for low-income customers. If the Commission determines that waiving the In-State Connection Fee for low- or no-volume or low-income customers is discriminatory, consistency would also dictate the Commission to also consider other plans such as LifeLine or LinkUp to be discriminatory. AT&T does not believe the conclusion is in the public interest. Public Counsel's attempts to portray AT&T's proposed charge as discriminatory because it is not applied to low- or no-volume or low-income customers should be dismissed as nothing more than a futile effort, albeit a creatively perverse one for an agency charged with protecting the public, to avoid the consequence of high access rates;

(6) With respect to the waiver of the charge for AT&T's local customers, the Commission has previously approved interexchange tariffs that offer discounts or waive various charges to customers who also purchase local service from the same company. For example, the Commission has approved the tariff of Birch Telecom of Missouri, Inc., that offers a 10% discount on interexchange services to customers who also purchase local service from Birch Telecom of Missouri, Inc. In approving the tariffs, the Commission must have concluded the waiver of fees or discounts was not discriminatory;

(7) AT&T did provide adequate customer notice. As part of implementing the surcharge, AT&T direct-mailed postcards describing the charge to each presubscribed customer. In addition to the explanation, the postcard also informed each customer of a toll-free number and a website where customers may learn more about the charge. AT&T believes these actions provide more than adequate notice to customers and certainly more than required by Missouri statutes. Based upon the information referenced in its motion, Public Counsel took advantage of these tools and found them useful in drafting its pleading;

(8) Public Counsel's claim that the surcharge is unreasonable has no merit. As stated previously, AT&T is a competitive telecommunications company. Any customer who so wishes, may freely select another long distance company. As the statutes and a competitive market dictate, it is the customer who determines whether AT&T charges are reasonable. Public

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Counsel's own motion acknowledges this by stating, "[T]he competitive marketplace determines to what extent the carrier will seek to recover all or any part of those costs in its rates." In contrast to its own statements, Public Counsel seeks to stand competitive classification on its head and impose rate regulation on competitive services offered by competitive carriers;

(9) Setting the competitive market and the law aside for a moment, the charge is completely reasonable, given Missouri's high access rates. While other states have reduced intrastate access rates to more closely approximate both their cost and interstate access rates, Missouri has not. In some instances, LECs in Missouri have even gone the other way and increased access rates. Based upon AT&T's data, Missouri ranks fifth in the nation for the highest average switched access rates. The only states exceeding Missouri in this category are North Dakota, South Dakota, New Mexico, and Alaska. The originating access rates charged by the largest three ILECs in Missouri (SWBT, Sprint, and Verizon) exceed their corresponding interstate rates by approximately 550%, 1250%, and 1400% respectively. In virtually every regulatory forum where AT&T has requested the Commission address the problem of Missouri's high in-state access rates, Public Counsel has consistently opined that the proceeding was not the proper forum for addressing Missouri's high access rates. Now, after refusing to address the problem of high access rates, Public Counsel is trying to hide the consequences of doing nothing; and

(10) In support of its motion, Public Counsel cites case number TO-99-596. In that case, the Commission did exercise jurisdiction over the rates competitive local exchange carriers charged as a condition of granting competitive classification. In this case, the Commission imposed an interim cap on the access rates charged by CLECs. In doing so, the Commission recognized that "access is a 'bottleneck' service that confers a locational monopoly upon the company providing it" and as a locational monopoly, switched access is not subject to normal competitive pressures. In similar recognition that access rates are not subject to true competitive pressure, the Federal Communications Commission is also imposing a cap on the interstate access rates that the CLECs may charge. However, the Commission's decision to place a cap on the switched access rates that CLECs may charge is completely irrelevant to the pending tariff. Interexchange services are truly competitive services and are subject to normal competitive

pressures. There is no dispute that every customer in Missouri has a meaningful choice of long distance providers. Given that every consumer has a choice, the Commission should not impose rate regulation on competitive services offered by competitive companies.

Also on September 7, 2001, the Missouri Independent Telephone Company Group (consisting of Alma Telephone Company, Chariton Valley Telecommunications Corporation, Choctaw Telephone Company, Mid Missouri Telephone Company, Modern Telecommunications Company, MoKAN Dial, Inc., and Northeast Missouri Rural Telephone Company) applied to intervene and to join in the motion to suspend filed by the Public Counsel. The application to intervene is not addressed in this order.

The MITG's motion to join in Public Counsel's motion to suspend contained the following points:

- (1) The MITG consists of seven small rural local exchange telecommunications company providing local exchange and exchange access service to customers residing in rural portions of Missouri;
- (2) The MITG asserts that the tariff of AT&T, and AT&T's business practices, violate rate averaging requirements of state law as contained in Section 392.230.1;
- (3) The tariff, and AT&T's business practices in pricing toll service, is in violation of 47 USC 254(g), which continued the federal prohibition against deaveraging of toll rates;
- (4) The federal averaging requirement requires AT&T to charge the same rate for the same service both within a state, and the same rate for the same service between different states;
- (5) As the FCC stated at paragraph 6 of its August 7, 1996 Report and Order in the matter of *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket 96-61: "Geographic rate averaging redounds to the benefit of rural ratepayers, and customers of high cost local exchange carriers. First, geographic rate averaging ensures that interexchange rates for rural areas, or areas served by high cost companies, will not reflect the disproportionate burdens that may be associated with common line recovery costs in these areas. Thus, geographic rate averaging furthers our goal of providing a universal nationwide

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telecommunications network. Second, geographic rate averaging ensures that ratepayers share in the benefits of nationwide interexchange competition. If prices are falling due to competition in the corridors carrying the most traffic, prices will also fall for rural Americans”;

(6) The purpose of rate averaging is to assure that customers in rural, high cost areas are charged the same toll rates as customers in urban, low cost areas. By averaging both high and low access charges in its pricing structure, AT&T should charge the same rates to all customers. However, the motivation behind the tariff in question once again is to charge higher rates for customers in higher cost areas;

(7) The attempted justification by AT&T is false, as in the last few years all access rate changes in Missouri have been reductions (with the exception of Northeast), not increases, and the rates of the largest ILECs most affecting AT&T's costs, SWBT, Sprint, and Verizon, have been reduced;

(8) On July 20, 2001, in case number TT-2000-22, after lengthy legal proceedings upholding the rate averaging requirements over AT&T's attempt to depart therefrom, AT&T filed an affidavit representing that its Overlay Plan, PSC Mo No. 15, Sheet 71.13, was available to all Missouri customers. However, attempts to obtain the overlay service indicate that this is not true. These attempts indicate that AT&T business office personnel will only provide “Overlay” service as part of AT&T's “One Rate Seven Cents Plan.” Under the “One Rate Seven Cents Plan,” the Missouri customer is charged 9 cents per minute for intraLATA intrastate toll, as was promised with Overlay, but there is also a \$ 4.95 per month service charge, which is not part of the Overlay tariff. In addition it was learned that under the “One Rate Seven Cents Plan,” the intrastate intraLATA rate available in Illinois is 4 cents per minute, a violation of rate averaging laws; and

(9) The proposed additional “instate connection fee” proposed herein would further exacerbate AT&T's ongoing violation of rate averaging requirements. Because subscription to AT&T Services require the customer to choose or “PIC” AT&T for both interLATA and intraLATA service, the additional charge is a burden and violation of both Missouri and Federal law.

On September 12, 2001, AT&T filed its response to MITG's response to Public Counsel's motion to suspend. The pleading contained the following points:

(1) The MITG erroneously asserts that the proposed tariff constitutes geographic deaveraging. In addition, the MITG makes several other misstatements, most of which are nevertheless irrelevant to the review and approval of AT&T's proposed tariff;

(2) AT&T is proposing to introduce the In-State Connection Fee throughout all exchanges in Missouri. There is simply no merit to MITG statements to the contrary. Even a cursory review of the proposed tariff indicates there are no geographic limitations on the proposed fee, nor are there any rates that vary by ILEC. The MITG asserts that AT&T's proposed tariff violates Section 392.230.1, but it does not say how -- which is understandable given that AT&T's tariff does not violate that Missouri statute. Even a casual reading of the MITG's motion demonstrates that the MITG makes nothing more than generalized assertions that AT&T is engaging in rate deaveraging, and there is nothing specific in the MITG's motion regarding the instant tariff application. While AT&T would prefer to base the In-State Connection Fee on the underlying access rates of each individual carrier and charge a different fee for each carrier, AT&T is not proposing to do so with this tariff filing. AT&T is proposing to charge the same \$1.95 charge in all areas of Missouri;

(3) The MITG has a history of making erroneous and frivolous claims that AT&T's tariffs violate rate-averaging requirements. In case number TT-2000-52, *In the Matter of AT&T Communications of the Southwest, Inc.'s Tariff Filing to Introduce AT&T All in One Service*, P.S.C. Mo. No. 17, the MITG (then known as the Mid-Missouri Group) filed a motion to suspend a tariff filing proposed by AT&T. In its motion to suspend, the MITG asserted the proposed tariff violated the federal rate averaging requirements. After suspending AT&T's proposed tariff for a period of 30 days to allow parties to respond, the Commission dismissed the MITG's claims stating that after the Commission reviewed AT&T's proposed tariff sheets, it found that the tariff sheets were not unlawful because the All In One Service rate is not limited to any particular area. According to the proposed tariff sheets, a uniform rate will apply to all areas of the state and any AT&T customer can get that rate for both interLATA and intraLATA toll calls. The Commission found that, because MITG's allegations were without merit on their face, there were no questions of fact to be decided and that no evidentiary hearing was necessary. The Commission also found that AT&T's tariff filing was reasonable and in the public interest and was approved;

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(4) As in that case, the MITG's claims in this case have no merit on their face and should be dismissed. Furthermore, the Commission's order in this matter should send a strong message to the MITG against filing pleadings with such frivolous and baseless arguments that only waste the time and resources of the Commission and of AT&T;

(5) The MITG also complains about AT&T's pricing practices in the state of Illinois and asserts that AT&T is violating FCC regulations against intrastate and interstate rate deaveraging. As noted above, AT&T's proposed intrastate fee is not deaveraged in any way, and the MITG has provided no example how it is or could be deaveraging under the proposed tariff. Secondly, AT&T's pricing in Illinois is irrelevant to Missouri and irrelevant to any argument of geographic deaveraging within Missouri. As a matter of jurisdiction, the Commission has no jurisdiction over the rates that AT&T charges in Illinois, and any frivolous MITG complaints about deaveraging interstate rates should be addressed by the MITG to the FCC. Beyond the jurisdictional issue, there is absolutely nothing in the FCC's rate averaging requirements that require AT&T to charge the same intrastate rates in different states. This argument by the MITG insults the Commission's intelligence, as it is common knowledge that intrastate toll rates vary from state to state, and there has been no move by the FCC or any state commission to compel such nationwide uniformity. AT&T does charge lower toll rates in Illinois. However, there is nothing unlawful about this. AT&T has lower intrastate toll rates in Illinois because the access rates charged by ILECs in Illinois are much lower than those in Missouri. Consequently Illinois consumers enjoy lower intrastate toll rates. While the MITG, and many other parties frequently appearing before the Commission, assert that access rate reductions do not provide customer benefits, one only has to look at Illinois to see the benefits of lower access rates. However, the MITG's deaveraging arguments concerning AT&T's Illinois rates are just as frivolous as the MITG's deaveraging arguments in general;

(6) On page 4, of its motion, the MITG asserts that "subscription to AT&T Services require the customer to choose or 'PIC' AT&T for both interLATA and intraLATA service" and for this reason the proposed charges is a "violation of both Missouri and Federal law." A simple review of AT&T's proposed tariff demonstrates that this statement is patently false, as AT&T does not require customers to choose or "PIC" AT&T for both interLATA and intraLATA services. A customer is free to select AT&T for either intraLATA toll service or InterLATA toll service or

both. This argument is also frivolous and provides no basis to suspend AT&T's proposed tariff;

(7) The MITG has no standing to seek to intervene in this proceeding. The MITG's basis for being granted intervention is that "the MITG has an interest in protecting the interests of its customers" and therefore, "its interests are different from that of the general public." Such a statement is nonsensical. The MITG is attempting to intervene to protect the interest of its customers who are member of the general public, yet the MITG then states its interest in representing the public is different from that of the general public;

(8) The MITG consists of seven incumbent local exchange carriers that are profit-seeking companies in the business of providing telecommunications service. Their regulated activities do not include purportedly representing their customer's interests, particularly regarding the retail long distance market. Representing the public, including the consumers in MITG's territory who purchase long distance service from other telecommunications carriers, is the role of the Office of Public Counsel. Commission Rule 4 CSR 240-2.075(4) allows the Commission to grant intervention on a showing that the proposed intervenor has an interest different from that of the general public and which may be adversely affected by a final order or granting the proposed intervention would serve the public interest. The MITG fails to meet either of these criteria. The MITG is attempting to intervene on behalf of the public so by definition its purported interests are the same as the general public. The MITG does not assert that its member companies may be adversely affected by a final order so the MITG fails the first criteria; the MITG has cited no justiciable interest in the subject of AT&T's application. The MITG does not even assert within its pleading that granting its request would be in the public interest, so it fails the second criteria for intervention; and

(9) The claims of geographic deaveraging made by MITG are erroneous and without merit on their face. The numerous other claims by the MITG are likewise erroneous or irrelevant or both. The MITG has no standing to intervene in the proceeding and its request to do so should be denied.

Public Counsel mistakenly suggests that Sections 392.200 and 392.185 provide the statutory basis for the Commission to review and suspend the tariff. Commission Rule 4 CSR 240-2.080(3) requires every party to indicate under what

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authority it is filing its pleading. The rule states: "Each pleading shall include a...specific reference to the statutory provision or other authority under which relief is requested." Public Counsel's motion did not comply with the rule in that it did not include a correct reference to the statutory provision under which it requested relief.

Public Counsel should have cited Section 392.230(3), under which the Commission has the discretionary authority to suspend, for 120 days plus six months, the effective date of a tariff for a new rate, rental, or charge. The Commission finds that, in order to allow more time to study the effect of the proposed tariff, it should be suspended under this statute. The statute states:

Whenever there shall be filed with the commission by any telecommunications company...any schedule stating a new individual or joint rate, rental or charge...the commission...may suspend the operation of such schedule and defer the use of such rate...but not for a longer period than one hundred and twenty days beyond the time when such rate...would otherwise go into effect; and after full hearing, whether completed before or after the rate, rental, [or] charge...goes into effect, the commission may make such order in reference to such rate, rental, [or] charge...as would be proper in a proceeding initiated after the rate, rental, [or] charge...had become effective; however, if any such hearing cannot be concluded within the period of suspension...the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months.

Before the Commission proceeds, the parties will be required to inform the Commission of their position on at least these two issues: (1) the factual basis, if any, for action by the Commission; and (2) the legal basis, if any, for action by the Commission, including specific references to statutes, cases, or other authority supporting any legal basis. The list of issues must contain at least the two questions presented for decision as set forth above, stated in the following form per issue: (a) in three separate sentences, with factual and legal premises, followed by a short question; (b) in no more than 75 words; and (c) with enough facts woven in that the Commission will understand how the question arises in the case. The questions must be clear and brief, using the style of the following examples of issue statements, which illustrate the clarity and brevity that the parties should aim for:

Example A: The Administrative Procedures Act does not require the same administrative law judge to hear the case and write the final order. ABC Utility Company filed an appeal based on the fact that the administrative law judge who wrote the final order was not the administrative law judge who heard the case. Is it reversible error for one administrative law judge to hear the

case and a different administrative law judge to write the final opinion?

Example B: For purposes of establishing rates, ABC Utility Company is entitled to include in its costs expenses relating to items that are used or useful in providing services to its customers. ABC Utility Company has spent money to clean up environmental damages resulting from the operation of manufactured gas plants some 70 to 80 years ago. Should ABC Utility Company be allowed to include these expenses among its costs in establishing its future natural gas rates?

The parties are not limited to two issues, but may, if they so desire, present additional issues they believe the Commission must consider.

IT IS THEREFORE ORDERED:

1. That the motion to suspend tariff filed by the Office of the Public Counsel on September 4, 2001, is granted and the tariff filed by AT&T Communications of the Southwest, Inc., on August 14, 2001, will be suspended for 30 days beyond the time when the tariff would otherwise go into effect, i.e., until October 15, 2001. The suspended tariffs are:

P.S.C. Mo. No. 15
Section 1, 7th Revised Sheet 7; Replacing Revised Sheet 7
and
Section 1, 7th Revised Sheet 8; Replacing Revised Sheet 8

2. That the Office of the Public Counsel, the Staff of the Missouri Public Service Commission, and AT&T Communications of the Southwest, Inc., must file and the Missouri Independent Telephone Company Group may file a list of issues in compliance with this order no later than September 20, 2001.

3. That any party filing a list of issues must send an electronic copy thereof to the judge at bhopkins@mail.state.mo.us.

4. That this order will become effective on September 23, 2001.

Simmons, Ch., Lumpe and Gaw, CC., concur Murray, C., dissents with dissenting opinion attached

Hopkins, Senior Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I disagree with the decision of the majority to suspend AT&T's tariff for all of the reasons expressed in the September 7, 2001 response of the Staff of the Commission.

AT&T's tariff filing complies with the statutory requirements for a competitive telecommunications service provider, and nothing in Public Counsel's or MITG's motions provides adequate reason for the Commission to suspend the tariff.

Therefore, I respectfully dissent.

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In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996.*

*Case No. TO-2001-455
Decided September 13, 2001*

Evidence, Practice & Procedure § 23. The Commission ruled that the Missouri Independent Telephone Group, which are small incumbent local exchange companies, had an interest too remote in the interconnection agreement to have a property interest, and therefore were not entitled to the due process of law guarantee of the right to be heard. Nevertheless, the ILECs did receive actual notice in sufficient time to advance their arguments before the Commission.

Evidence, Practice & Procedure § 28. The Commission rejected the Missouri Independent Telephone Group's request to intervene in an arbitrated interconnection agreement. The Commission found that MITG was not a necessary and indispensable party. The Commission has discretion to allow intervention to parties who are not necessary and indispensable. However, the Commission could not grant intervention and rule on the arbitrated agreement within the thirty-day statutory deadline.

Telecommunications § 46.1. The Commission rejected the Missouri Independent Telephone Group's request to intervene in an arbitrated interconnection agreement. The Commission found that MITG was not a necessary and indispensable party. The Commission has discretion to allow intervention. However, the Commission could not grant intervention and also rule on the arbitrated agreement within the statutory deadline. Section 252(e)(4) requires the Commission to rule on an arbitrated interconnection agreement within thirty days of its filing.

**ORDER DENYING INTERVENTION, APPROVING INTERCONNECTION
AGREEMENT, AND CLOSING CASE**

This order denies an application to intervene, approves an arbitrated interconnection agreement, and closes this case.

Procedural History:

On February 20, 2001, AT&T Communications of the Southwest, TCG St. Louis, Inc., and TCG Kansas City, Inc. (collectively, AT&T),¹ filed a joint petition for arbitration with the Commission pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code (the Act), and its implementing regulations, and pursuant to Section 386.230,

*The Commission, in an order issued on October 9, 2001, denied a rehearing in this case.

¹ For convenience sake, the Commission will refer to the Petitioners in the singular.

RSMo 2000.² The petition asked the Commission to arbitrate unresolved issues in the successor interconnection agreement between AT&T and Southwestern Bell Telephone Company (SWBT). After an extensive evidentiary hearing, the Commission issued its Arbitration Order on June 7, 2001. On August 15, 2001, the parties submitted their executed interconnection agreements to the Commission for approval as required by the Act.³

Intervention:

On September 3, 2001, the Missouri Independent Telephone Group (MITG), consisting of six small incumbent local exchange carriers (ILECs): Alma Telephone Company, Chariton Valley Telephone Corporation, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial, Inc., and Northeast Missouri Rural Telephone Company, filed its Application to Intervene. MITG seeks intervention in order to oppose the Agreement, which it contends discriminates against small ILECs because it contemplates the delivery of traffic to them without providing for any compensation.

Intervention is the process whereby a stranger becomes a full participant in a legal action.⁴ The civil rules, unlike the Commission's rules, distinguish between those with a right to intervene and those with a mere desire to do so.⁵ However, due process requires that any person with a liberty or property interest that will be directly affected by the outcome of a proceeding be permitted to intervene upon timely application.⁶ Such persons have a right to intervene.⁷ In considering MITG's application, the Commission must first determine whether the intervention applicant has such a direct interest in the outcome of the proceeding as to have a right to intervene. It is noteworthy, in this respect, that MITG asserts that its members are "necessary and indispensable" parties to this action because the Agreement, if approved, will likely result in the delivery of traffic to the networks of MITG's members for termination. A necessary or indispensable party is one that will be so directly affected by the outcome of an action that fundamental fairness requires that it be joined as a party.

Is MITG a necessary or indispensable party to this action? The fact that the intervention applicant may suffer an adverse monetary impact from the proceeding is not necessarily sufficient to confer a right to intervene. In *Ballmer*, an insurance company sought to intervene in a "friendly" lawsuit wherein a father sued his son for the wrongful death of another son in an automobile accident.⁸ The insurance company sought to intervene to prevent its insured from confessing judgment.⁹

² All references herein to the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 2000.

³ There are three interconnection agreements at issue, a separate one for each of the three Petitioners. For convenience and clarity, all three agreements shall be referred to simply as "the Agreement."

⁴ *Ballmer v. Ballmer*, 923 S.W.2d 365, 368 (Mo. App., W.D. 1996).

⁵ Rule 52.12, Mo. R. Civ. Pro.

⁶ See U.S. Constitution, Amendment XIV; Missouri Constitution, Article I, Section 10 (1945).

⁷ *Ballmer* 923 S.W.2d at 368.

⁸ *Ballmer*, *supra*.

⁹ An action that would likely obligate the insurance company up to the limit of the policy.

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Intervention was denied because the insurer lacked an interest in the case: “As to whether State Farm has an ‘interest’ in the underlying action, this court has stated that ‘the liability of an insurer as a potential indemnitor of the judgment debtor does not constitute a direct interest in such a judgment as to implicate intervention as a matter of right.’”¹⁰

In *Ballmer*, State Farm was not a participant in the accident that was the subject of the suit; rather, it was a potential indemnitor. Thus, its interest was too remote to confer a right to intervene. MITG and its members are not parties to the Agreement at issue in this case; rather, the Agreement *may* result in traffic being terminated on their networks without compensation. The Commission concludes that their interest in the Agreement is remote and indirect and that MITG does not have a right to intervene. It is not a necessary or indispensable party to this proceeding.

MITG asserts repeatedly in its application that it has a “due process right” to be heard with respect to its contention that the Agreement is discriminatory against small ILECs, including its members. MITG also asserts that the Commission has failed to give adequate notice of this proceeding. However, in the same way that the remote and indirect nature of MITG’s interest in this matter does not confer a right to intervene, so it does not confer a right to be heard or a right to notice. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from depriving any person of “life, liberty or property” without “due process of law.” The Commission has determined that MITG and its members lack a property or liberty interest in this matter such as would create the sort of rights MITG seeks to assert. In any event, MITG’s complaint of inadequate notice is mooted by the demonstrable fact that it did receive actual notice and acted upon it in time to lay its concerns before the Commission. Additionally, MITG has been heard and its objections are discussed in detail later in this order.

Under its Rule 4 CSR 240-2.075, the Commission has discretion to grant intervention if doing so will serve the public interest. However, the Commission cannot grant intervention in this case because the statutory time line does not permit extended proceedings such as would be necessary were intervention granted. While the Act requires that the parties submit the arbitrated interconnection agreement for approval by the state commission,¹¹ the Act also provides that the state commission has only 30 days within which to approve or reject the agreement.¹² If the state commission does not act by the 30th day, the agreement is “deemed” approved by operation of law.¹³ This scheme does not contemplate extended proceedings and, indeed, cannot as a practical matter encompass intervention. When MITG filed its application on September 3, only 12 days remained of the 30-day approval period. That interval does not permit the sort of proceedings implied by granting intervention.

The Commission will deny the application for intervention filed by MITG. However, the Commission will consider the objections to the Agreement set out at length by MITG in its application.

¹⁰ *Id.* (citations omitted).

¹¹ The Act, 47 U.S.C. Section 252(e)(1).

¹² The Act, 47 U.S.C. Section 252(e)(4).

¹³ *Id.*

Staff Memoranda and Recommendation:

On August 28, the Staff filed its first Memorandum and Recommendation. Therein, Staff advised the Commission to approve the Agreement. However, that memorandum only addressed the issue of the Agreement's compliance with the Commission's Arbitration Order. It failed to address the question of the Agreement's compliance with the standards imposed by the Act at 47 U.S.C. Section 252(e)(2), (A) and (B). Therefore, on September 6, the Commission directed its Staff to file a second memorandum by September 10, addressing the issue of the Agreement's compliance with the Act.

On September 10, the Staff filed its Second Memorandum and Recommendation. Therein, Staff advised the Commission that, after review of the Agreement, its opinion is that the negotiated portions comply with the standards imposed by the Act at 47 U.S.C. Section 252(e)(2)(A) and that the arbitrated portions comply with the standards at 47 U.S.C. Section 252(e)(2)(B). Staff again advised the Commission to approve the Agreement.

Objections:

MITG states that the Agreement is discriminatory against its members because it provides that Petitioners AT&T, TCG St. Louis and TCG Kansas City may deliver traffic to SWBT for termination on the networks of third-party carriers, such as the members of MITG, without providing for any compensation to the third-party carriers, without interconnection with the third-party carriers, and without entering into any agreement with the third-party carriers. MITG asserts that the Act does not contemplate that interconnection agreements will address traffic requiring three or more carriers to complete. MITG states that the Agreement, as presented to the Commission for approval, addresses toll traffic intended for non-party carriers and both toll and local traffic originating with AT&T and its affiliates and delivered by SWBT to non-party LECs for termination. MITG argues that these features of the Agreement are discriminatory because they discourage "CLECs and wireless carriers" from entering into interconnection agreements with the small ILECs.

MITG also contends that the Agreement discriminates against its members because it does not require AT&T and its affiliates to have direct, physical interconnections with them. MITG further objects that the Agreement contemplates the delivery of traffic to the small ILECs without any corresponding provisions for recording, measurement and billing of such traffic, intercompany compensation, or the prevention of uncompensated traffic. MITG asserts that the Agreement will result in the delivery of uncompensated traffic to the networks of its members.

On September 7, the Small Telephone Company Group (STCG) filed its Concurrence with MITG's objections. STCG consists of 25 small ILECs.¹⁴ STCG, like MITG, contends that the Agreement discriminates against its members insofar

¹⁴BPST Telephone Company; Cass County Telephone Company; Citizens Telephone Company of Higginsville, Inc.; Craw-Kan Telephone Cooperative, Inc.; Ellington Telephone Company; Farber Telephone Company; Goodman Telephone Company; Granby Telephone Company; Grand River Mutual Telephone Corporation; Green Hills Telephone Company; Holway Telephone Company; Iamo Telephone Company; Kingdom Telephone Company; KLM Telephone Company; Lathrop Telephone Company; Le-Ru Telephone Company; McDonald County Telephone Company; Mark Twain Rural Telephone Company; Miller Telephone Company; New Florence Telephone Company; Oregon Farmers Mutual Telephone Company; Ozark Telephone Company; Rock Port Telephone Company; Seneca Telephone Company; and Steelville Telephone Exchange, Inc.

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as it provides for the delivery of traffic for termination on their networks. The Agreement is discriminatory, argues STCG, in that it establishes the terms and conditions under which traffic will be terminated to non party carriers without their approval or participation.

The Commission takes notice that such traffic has been a matter of considerable and continuing concern to the members of MITG, STCG and other small ILECs because they believe it represents a considerable loss of revenue.¹⁵ These small ILECs are interconnected with the networks operated by such large carriers as SWBT and, consequently, are indirectly interconnected with every other carrier in the nation. Other carriers are able to use this indirect interconnection to terminate traffic to the subscribers of the small ILECs without paying terminating access charges. Because the small ILECs are generally unable to interdict or even to measure such traffic, the originating carriers are able to engage in this traffic with impunity.

The objections raised by MITG and STCG are expressly rejected by Staff in its Second Memorandum and Recommendation. Staff concludes that the Agreement is not discriminatory to non-party carriers because, “[a]lthough there are references to third-party traffic, . . . [the Agreement] does not address how those calls will be carried or compensated by or to the third party.” In its Response filed on September 10, SWBT states that the Agreement is not discriminatory because any carrier may take advantage of the Agreement pursuant to the Act.¹⁶ Likewise, SWBT argues that the Agreement properly provides for traffic to non-party carriers in compliance with the Act and, equally properly, does not dictate the terms and conditions under which that traffic is terminated.¹⁷

Having considered the arguments of the parties and the objections of MITG and STCG, the Commission concludes that the Agreement is not discriminatory to non-party carriers.

Approval of the Agreement:

The Act provides that an arbitrated interconnection agreement must be approved within 30 days of submission.¹⁸ The Commission must approve the Agreement unless the negotiated portions fail to comply with the standard at 47 U.S.C. Section 252(e)(2)(A) or the arbitrated portions fail to comply with the standard at 47 U.S.C. Section 252(e)(2)(B). The Commission may reject the negotiated portions of an interconnection agreement only if the agreement is discriminatory against non-party carriers or is inconsistent with the public interest, convenience and necessity.¹⁹ The Commission may reject the arbitrated portions

¹⁵ See *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce its Wireless Termination Service*, Case No. TT-2001-139 (Report and Order, issued February 8, 2001), p. 11.

¹⁶ The Act, 47 U.S.C. Section 252(i).

¹⁷ The Act, at 47 U.S.C. Section 251(a)(1), obligates all carriers to interconnect, directly and indirectly, with other carriers.

¹⁸ The Act, 47 U.S.C. Section 252(e)(4).

of an interconnection agreement only if they do “not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.”²⁰

Staff has stated in its Second Memorandum and Recommendation that, after review of the Agreement, its opinion is that the negotiated portions comply with the standards imposed by the Act at 47 U.S.C. Section 252(e)(2)(A) and that the arbitrated portions comply with the standards at 47 U.S.C. Section 252(e)(2)(B). Staff advised the Commission to approve the Agreement. No party has raised any objection other than that of discrimination against non-party carriers, which the Commission has fully considered and rejected. Therefore, the Commission will approve the Agreement.

Modification Procedure:

This Commission has a duty to review all resale and interconnection agreements, whether arrived at through negotiation or arbitration, as mandated by the Act.²¹ In order for the Commission’s role of review and approval to be effective, the Commission must also review and approve or recognize modifications to these agreements. The Commission has a further duty to make a copy of every resale and interconnection agreement available for public inspection.²² This duty is in keeping with the Commission’s practice under its own rules of requiring telecommunications companies to keep their rate schedules on file with the Commission.²³

The parties to each resale or interconnection agreement must maintain a complete and current copy of the agreement, together with all modifications and amendments, in the Commission’s offices.²⁴ Any proposed modification or amendment must be submitted for Commission approval or recognition, whether the modification arises through negotiation, arbitration, or by means of alternative dispute resolution procedures.²⁵

The parties have provided the Telecommunications Staff with a copy of the interconnection agreement with the pages numbered consecutively in the lower right-hand corner. Modifications to an agreement must be submitted to the Staff for review. When approved or recognized, the modified pages will be substituted in the agreement, which should contain the number of the page being replaced in the lower right-hand corner. Staff will date-stamp the modified pages and insert them into the Agreement. The Telecommunications Staff will maintain the official record of the original agreement and all modifications in the Commission’s tariff room.

¹⁹ The Act, 47 U.S.C. Section 252(e)(2)(A).

²⁰ The Act, 47 U.S.C. Section 252(e)(2)(B). This standard is distinct from the standard applicable to *negotiated*, as opposed to *arbitrated*, interconnection agreements. See the Act, 47 U.S.C. Section 252(e)(2)(A).

²¹ The Act, 47 U.S.C. Section 252.

²² The Act, 47 U.S.C. Section 252(h).

²³ See Commission Rule 4 CSR 240-30.010.

²⁴ The Act, 47 U.S.C. Section 252(h).

²⁵ The Act, 47 U.S.C. Section 252.

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The Commission does not intend to conduct a full proceeding each time the parties agree to a modification. Where a proposed modification is identical to a provision that has been approved by the Commission in another agreement, the Commission will take notice of the modification once Staff has verified that the provision is an approved provision, and prepared a recommendation. Where a proposed modification is not contained in another approved agreement, Staff will review the modification and its effects and prepare a recommendation advising the Commission whether the modification should be approved. The Commission may approve the modification based on the Staff recommendation. If the Commission chooses not to approve the modification, the Commission will establish a case, give notice to interested parties and permit responses. The Commission may conduct a hearing if it is deemed necessary.

IT IS THEREFORE ORDERED:

1. That the interconnection agreements between Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, filed on August 15, 2001, are approved.
2. That any changes, amendments or modifications to these agreements shall be filed with the Commission for approval pursuant to the procedure outlined in this order.
3. That this order shall become effective on September 15, 2001.
4. That this case may be closed on September 16, 2001.

Simmons, Ch., Murray, Lumpe, and Gaw, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

Director of the Manufactured Housing and Modular Units Program of the Public Service Commission, Petitioner, v. Wightman Enterprises, Inc., doing business as Lee's Mobile Homes, Respondent.*

*Case No. MC-2002-12
Decided September 18, 2001*

Manufactured Housing § 1. The Commission ruled that the Director was entitled to a default order. Commission Rule 4 CSR 240-2.070(9) gives a respondent thirty days to respond to a complaint. Wightman failed to respond within the thirty days.

ORDER GRANTING DEFAULT

On July 5, 2001, the Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission filed his complaint seeking

*See page 547 for another order in this case. This order contains a correction approved by the Commission in an order issued on September 19, 2001.

discipline against the dealer registration of Wightman Enterprises, Inc., doing business as Lee's Mobile Homes. The Commission issued its Notice of Complaint on July 12, 2001, advising Respondent of various options open to it and further advising Respondent that it must pursue one of these options by August 12, 2001. That date has come and gone and the Commission has received no response or any other contact from Respondent.

Commission Rule 4 CSR 240-2.070 governs complaints. That rule, at section (9), provides:

If the respondent in a complaint case fails to file a timely answer, the complainant's averments may be deemed admitted and an order granting default entered. The respondent has seven (7) days from the issue date of the order granting default to file a motion to set aside the order of default and extend the filing date of the answer. The commission may grant the motion to set aside the order of default and grant the respondent additional time to answer if it finds good cause.

Respondent has failed to file an answer and the Commission will enter its order granting default and deeming the Director's averments admitted.

Respondent shall have seven days from the effective date of this order within which to move the Commission to set aside the order of default. Any such motion must be supported by a showing of good cause for Respondent's failure to answer by August 12. If Respondent does not petition the Commission within seven days to set aside the default, the Commission will find as facts the allegations in the Complaint and will grant the Director the relief requested in the Complaint.

IT IS THEREFORE ORDERED:

1. That default is hereby entered against Respondent Wightman Enterprises, Inc., doing business as Lee's Mobile Homes, and the averments of the Complaint are deemed admitted.
2. That this order shall become effective on September 28, 2001.

Simmons, Ch., Murray, Lumpe, and Gaw, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

In the Matter of The Empire District Electric Company's Tariff Sheets Designed to Implement a General Rate Increase for Retail Electric Service Provided to Customers in the Missouri Service Area of the Company.

Case No. ER-2001-299
Decided September 20, 2001

Electric §1. The Commission rejected proposed tariff sheets designed to implement an annual general rate increase for electric service provided to retail customers in the Missouri service area of the company. The company requested an annual increase in its revenues of approximately \$41,467,926. The Commission authorized the company to file proposed tariff sheets in compliance with the order, which would result in a smaller increase in annual revenues and incorporate an Interim Energy Charge on customer bills.

Electric §20. The Commission rejected proposed tariff sheets designed to implement an annual general rate increase of approximately \$41,467,926, for electric service provided to retail customers in the Missouri service area of the company. The Commission authorized the company to file proposed tariff sheets in compliance with the order, which would result in a smaller increase in annual revenues and incorporate an Interim Energy Charge on customer bills.

Electric §22. The Commission rejected proposed tariff sheets designed to implement an annual general rate increase of approximately \$41,467,926, for electric service provided to retail customers in the Missouri service area of the company. The Commission authorized the company to file proposed tariff sheets in compliance with the order, which would result in a smaller increase in annual revenues and incorporate an Interim Energy Charge on customer bills.

Electric §29. The Commission rejected the electric company's tariff designed to produce an annual increase in the company's revenues of approximately \$41,467,926. The order authorized the company to file tariff sheets designed to produce a smaller increase in permanent revenues and allowed the company to incorporate an Interim Energy Charge on customer bills. The Interim Energy Charge will be in effect for two years and is subject to refund with interest to customers of the company.

Appearances

Gary W. Duffy, James C. Swearengen, and Dean L. Cooper, Brydon, Swearengen & England P.C., Post Office Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102, for The Empire District Electric Company.

Stuart W. Conrad and Jeremiah D. Finnegan, Finnegan, Conrad & Peterson, 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri 64111, for Praxair, Inc.

John B. Coffman, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Dana K. Joyce, General Counsel, *Steven Dottheim*, Chief Deputy General Counsel, *Dennis L. Frey*, Associate Counsel, and *Nathan Williams, Bruce Bates, Eric Anderson, and David Meyer*, Legal Counsel, Missouri Public Service Commis-

sion, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Vicky Ruth, Senior Regulatory Law Judge.

REPORT AND ORDER

This order rejects a tariff filed by The Empire District Electric Company that was designed to produce an annual increase of approximately \$41,467,926 in the Company's revenues. This order authorizes The Empire District Electric Company to file tariff sheets to increase permanent electric revenues and allows the Company to incorporate an Interim Energy Charge on customer bills. The Interim Energy Charge will be in effect for two years and is subject to refund with interest to customers of the Company.

Procedural History

On November 3, 2000, The Empire District Electric Company filed with the Missouri Public Service Commission proposed tariff sheets intended to implement a general rate increase for electric service provided to retail customers in the Missouri service area of the Company. Empire is a public utility engaged in the provision of electric service to the general public in the state of Missouri and is subject to the general jurisdiction of the Commission pursuant to Chapters 386 and 393, RSMo 2000.

The proposed tariff sheets bore a requested effective date of December 3, 2000, and were designed to produce an annual increase of approximately 19.3 percent (\$41,467,926) in the Company's revenues. The Company also filed direct testimony in support of its requested rate increase.

On November 13, 2000, Praxair, Inc., filed its Application to Intervene. The Commission granted Praxair's request for intervention on December 22, 2000.

On November 16, 2000, the Commission issued its Suspension Order and Notice, suspending the proposed tariff sheets until October 2, 2001. On December 21, 2001, an early prehearing conference was held.

The parties filed their joint Proposed Procedural Schedule and Clarification of True-up and Updates on December 28, 2000. On January 4, 2001, the Commission issued its Order Setting Test Year, Setting True-up Hearing, and Adopting Procedural Schedule. The Commission adopted the procedural schedule recommended by the parties and ordered the use of a test year of the 12 months ending December 31, 2000, updated with respect to certain agreed items for known and measurable changes. The Commission also adopted the recommendation of the parties that the true-up with respect to Empire's new State Line Combined Cycle (SLCC) Generating Plant be extended until July 31, 2001.

The parties filed prepared testimony in accordance with the Commission's order.

The parties also participated in another prehearing conference on April 16, 2001. The Commission conducted a local public hearing in Joplin, Missouri, on April 23, 2001.

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On May 14, 2001, Empire, the Staff of the Commission, and the Office of the Public Counsel filed a Stipulation and Agreement Regarding In-service Criteria. Praxair did not sign this agreement. On that same date, the same parties also submitted a nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense. Praxair did not sign this agreement.

Also on May 14, 2001, Staff filed, on behalf of all the parties, a Proposed List of Issues, List of Witnesses, and Order of Cross-examination. Thereafter, each of the parties timely filed their statements of position on the List of Issues.

On May 15, 2001, Staff filed a proposed procedural schedule regarding the Stipulation and Agreement Regarding Fuel and Purchased Power filed May 14, 2001.

On May 18, 2001, counsel for Praxair filed a letter with the Commission requesting a hearing on all issues comprehended by the May 14, 2001, nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense. On May 22, 2001, Empire and Public Counsel filed a joint Motion to Schedule Hearing on Fuel and Purchased Power Issues contemplated by the May 14 nonunanimous Stipulation and Agreement.

On May 23, 2001, Staff filed, on behalf of all parties, a Reconciliation of Parties' Positions on the Revenue Requirement Issues.

In an Order Directing Filing issued May 24, 2001, the Commission noted that while Praxair had made a timely request for hearing regarding the nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense, no such request was filed by any party regarding the Stipulation and Agreement Regarding In-service Criteria. The Commission ruled that the Stipulation and Agreement Regarding In-service Criteria would be considered as unanimous pursuant to 4 CSR 240 2.115(1) and (3). The Commission denied the motion of Empire and Public Counsel for a procedural schedule and rejected the proposed procedural schedule submitted by the Staff. The Commission ordered the parties to file a supplement to the list of issues and witnesses previously filed regarding fuel and purchased power expense, and directed the parties to address in their opening statements and briefs the effect, if any, of passage of Senate Committee Substitute for Senate Bill No. 387 on this case.

On May 25, 2001, the parties filed a Unanimous Stipulation and Agreement as to State Line Combined Cycle Unit Capital Costs.

The Commission commenced the evidentiary hearing on May 29, 2001. The hearing concluded on June 6, 2001.

On June 4, 2001, Staff filed a Revised List of Issues, List of Witnesses and Order of Cross-examination on behalf of all parties. Also on June 4, 2001, the parties filed a Unanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense and Class Cost of Service and Rate Design.

Staff filed, on behalf of all parties, a revised reconciliation on the revenue requirement issues on June 5, 2001.

On June 19, 2001, the Commission issued an Order Rescheduling True-up Hearing. The hearing was held as scheduled on August 23-24, 2001.

The parties filed initial briefs on July 10, 2001, and reply briefs on August 3, 2001. Empire, Staff, and Public Counsel filed Proposed Findings of Fact and Conclusions

of Law on August 3, 2001. Empire and Staff later filed supplemental Proposed Findings of Fact and Conclusions of Law regarding the true up issues.

True-up initial briefs were filed on August 30, 2001, and true-up reply briefs were submitted by September 4, 2001.

Staff filed its Revised True-up Revenue Requirement on August 23, 2001. Staff filed the True-up Reconciliation of Parties' Positions on the Revenue Requirement Issues and Motion for Leave to File Out of Time on August 31, 2001.

On September 12, 2001, the Staff of the Missouri Public Service Commission filed a motion to strike portions of Empire's True-up Reply Brief. By order issued September 13, 2001, the Commission shortened the time for the parties to respond to Staff's motion. Praxair filed a response in support of Staff's motion on September 14, 2001. On the same date, Empire filed its response in opposition to Staff's motion.

On September 13, 2001, the Commission issued an Order Directing Scenarios. Staff filed its Response on September 14, 2001. Empire filed a reply to Staff's scenarios on September 17, 2001.

Pending Motions

As noted above, Praxair filed a letter on May 18, 2001, requesting a hearing on all issues found in the nonunanimous stipulation and agreement regarding fuel and purchased power expense that was filed on May 14, 2001. Staff filed a motion to schedule a hearing on this issue on May 15, 2001. On May 22, 2001, Empire and Public Counsel filed a joint motion to schedule a hearing on these fuel and purchased power expense issues. However, the parties subsequently filed a Unanimous Stipulation and Agreement addressing the Fuel and Purchased Power issues on June 4, 2001. As a result of this Unanimous Stipulation and Agreement, Praxair's request for a hearing on the prior stipulation and agreement is moot. Likewise, the requests to schedule a hearing on these issues are also moot.

On August 31, 2001, Staff filed the True-up Reconciliation of Parties' Positions on the Revenue Requirement Issues, along with a Motion for Leave to File Out of Time. Staff notes that the parties were directed to file the True-up Reconciliation by August 30, 2001, but that the process of resolving differences regarding the numbers to be included therein prevented a timely filing. As a result, the document was filed one day late. Staff noted that all of the parties to the case are in support of the True-up Reconciliation, that no party objects to its late filing, and that no party is adversely affected by the brief delay in filing. The Commission finds that the request for leave to file out of time is reasonable and should be granted.

On September 12, 2001, the Staff of the Missouri Public Service Commission filed a motion to strike portions of Empire's True-up Reply Brief. Staff argues that Empire improperly included argument on two subjects that were not subject to true up, were not directly addressed in the prefiled true-up testimony that any party filed, and were not addressed in the initial true-up briefs to which the company was responding. Staff requests that the Commission strike certain portions of Empire's true-up briefs, or in the alternative, that Staff and the other parties should be given an opportunity to respond. By order issued September 13, 2001, the Commission

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shortened the time for the parties to respond to Staff's motion. Praxair filed a response in support of Staff's motion on September 14, 2001. On the same date, Empire filed its response in opposition to Staff's motion.

Empire counters that Staff concedes in paragraph 3 of its motion that the issues to which Staff refers, capital structure and cost of capital, are true-up issues. Empire indicates that these issues are addressed in the true-up testimony of both Staff and Public Counsel. As to the argument regarding minimal solvency, Empire argues that the concept was discussed in Empire witness Donald A. Murry's rebuttal testimony and in the Company's Initial Brief and Reply Brief. Empire dismisses as absurd Staff's position regarding the citation of the reported cases from other jurisdictions.

The Commission determines that the arguments in Staff's Motion to Strike, filed September 12, 2001, are without merit. The Commission will deny Staff's motion to strike and will also deny Staff's alternative request that Staff and other parties be given an opportunity to respond.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Empire is a public utility engaged in the provision of electric service to the general public in the state of Missouri and is subject to the general jurisdiction of the Commission pursuant to Chapters 386 and 393, RSMo 2000. Empire's principal place of business is located in Joplin, Missouri.

1. COST OF SERVICE - DEPRECIATION

While the parties agree that the depreciation should be based on calendar year 2000, for plant other than its State Line Combined Cycle unit, Empire asserts that it should recover from Missouri customers \$28,445,716 per year for depreciation while the Staff states that the recovery should be \$18,249,834 per year. The difference in the depreciation recovery the Staff and Empire propose is attributable to differences in their approaches to determining average service lives, net salvage and amortization of net salvage.

Empire takes present plant and predicts future events in determining depreciation. In contrast, the Staff relies on data from past events to determine depreciation. Empire projects both the date generation plant will be retired and all the major maintenance cost events that it anticipates will transpire before that retirement date. The Company then uses the estimates of the costs associated with those projected events and investment already made as the basis for determining the depreciation rates it proposes for its generation plant. In contrast, the Staff uses existing mortality data to determine average service lives for Empire's generation plant and the actual expenditures Empire has made to determine the depreciation rates that it proposes. Further, Empire includes net salvage cost as a depreciation rate component while the Staff separately states net salvage cost

as an expense. Like its determination of depreciation, Empire projects the date generation plant will be retired, the cost of removal at that date and the gross salvage value of the plant at that date in determining net salvage cost. Staff uses the plant removal costs that Empire has incurred in the past five years and the gross salvage value it has realized during those same five years to project Empire's net salvage cost.

The parties agree that depreciation and net salvage cost should be reviewed frequently. A potential advantage of Empire's approach is that the rate impact of depreciation and net salvage cost should remain at a constant level for each particular generating unit during the life of that unit. The disadvantages are that it relies on both projections of when future events will occur and on the costs associated with those future events. In contrast, because the Staff's approach is based on data from the recent history of the company, the depreciation and net salvage cost that the Staff propose more closely track the recent experience of the company and do not require the estimation of costs that will not be incurred until far in the future.

Empire presented the testimony of its consultant to support the average service lives for generation plant that it proposes in this case. Notably absent in this case is testimony from employees of Empire that Empire will retire units on or about the dates sponsored by that consultant. It is not disputed that using dates certain for retiring generating units has the impact of shortening plant service lives. Further, the testimony of Empire witness Beecher that Empire needed to construct its State Line combined cycle unit to meet load demand it projected in the past dovetails with the testimony of Staff witness Adam that Empire projects load demand in the near future that it does not now have capacity to meet and, therefore, is planning the construction of additional generating units to meet that load, but has no plans for replacing existing generating capacity. The generation unit retirement dates sponsored by Empire's consultant are not credible.

The Staff and Empire agree that for the State Line Combined Cycle unit the design life of 35 years should be used for the average service life, since there is no empirical data upon which to determine average service lives of the plant at that unit. With the exception of the State Line Combined Cycle unit, the Staff based its average service lives on mortality data received from Empire. It used that mortality data to create survivor curves and, ultimately, to determine average service lives. The approach to determining service lives taken by the Staff is essentially the same as that used by Empire, except that Empire truncated the survivor curves by using dates certain for retiring all plant at each separate generating unit. This results in shortening the average service life of the plant. Having found that the fixed retirement dates in the testimony of Empire's consultant are based on his experience with generating units owned by other utilities, but not based on prior experience with Empire or even Empire's planned retirement dates, with the exception of plant at the State Line Combined Cycle unit, the Commission rejects the average service lives proposed by Empire and finds that the average service lives that the Staff determined are the appropriate service lives to be used in this case for establishing depreciation. Those average service lives are set forth in Appendix A, attached hereto.

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The Staff and Empire disagree as to whether future major maintenance costs should be considered when determining depreciation; Empire would include them, the Staff would not. Because Empire's approach requires that both the date each future major maintenance cost will be incurred and the magnitude of those costs be projected, the Commission finds it to be too speculative. The Commission finds that depreciation rates should not include these estimated future costs and that the appropriate time to consider such costs is when they are known.

The Staff and Empire also disagree on whether depreciation rates should include net salvage value. Inclusion of net salvage value creates the need to project the date that plant will be removed, the cost of removal at the time it is removed and the gross salvage value, for plant that may never be removed or at least not be removed for some considerable time after it is retired. Unit 6 at Empire's Riverton site was retired, but presently remains on site. This uncertainty provides sufficient grounds to reject Empire's determination of net salvage cost. The Staff's approach of treating net salvage cost as an expense based on Empire's recent historical data reduces this uncertainty. Additionally, separately stating net salvage cost, rather than incorporating it in depreciation rates, appropriately identifies the significance of net salvage cost on rates. The Commission finds that net salvage cost considered in setting rates should be based on historical net salvage cost that Empire has actually incurred in the recent past and that it should be treated as an expense.

2. COST OF SERVICE – BAD DEBT

Shall Empire's bad debt expense be allowed to follow changes in Missouri jurisdictional revenue?

The parties agreed upon an amount to be included in Empire's cost of service in this case that reflects Empire's bad debt expense. This amount is based on a factor of one-quarter of one-percent (0.25%) of Empire's revenues. Empire proposes that this .25% bad debt factor be applied to the rate increase that the Company will be authorized in this case. The other parties oppose factoring up the rate increase by the .25% amount.

Whether a direct correlation between revenue levels and bad debts for a utility exists is dependent upon case-by-case circumstances. (GR-96-285, 5 Mo. P.S.C. 3d, p. 447.) Empire's witness Gipson testified that in six of the last eight years Empire's bad debt expense has increased as its revenues have increased. However, Staff witness Boltz testified that the relationship between revenues and bad debt write-offs at Empire in the last five years has varied greatly. Mr. Boltz also stated that in any given year, revenues and customers may increase but bad debt expense and actual write-offs may decrease.

Whether the bad debt will increase as a result of a rate increase and the amount of the increased revenues is a matter of speculation. The Commission finds that the evidence in this case does not persuasively show a reliable correlation between revenues and bad debt expense. The Commission finds that Empire's bad debt expense should not be adjusted to reflect the additional revenues resulting from this proceeding.

3. COST OF SERVICE – PAYROLL – INCENTIVE PAY

Shall discretionary, performance-based incentive pay for employees be allowed?

Incentive awards were accrued and expenses by Empire for the year 2000 in the amount of \$323,000, the test year of this case.¹ Empire seeks to recover this \$323,000 in rates. The other parties oppose including these costs in rates. This particular incentive award plan was commenced by Empire in 1997 for its nonunion, non-officer employees and includes hourly and salaried employees through mid-managers. The first payment under this plan occurred in 1998. One aspect of Empire's incentive compensation program allows employees who meet both "base goals" and "stretch goals" to become eligible to receive additional compensation.

Pursuant to Empire's incentive compensation program, if an employee meets both his or her base and stretch goals, that person becomes eligible to receive incentive compensation. During the year 2000 Empire was involved in a pending merger with UtiliCorp United Inc. (UtiliCorp). As a result of that pending merger and the resulting staff shortages, the execution of Empire's incentive program was not up to its previous standard.

Nonetheless, the Commission finds that the incentive payments at issue were made to employees who did in fact achieve goals that were beyond their normal job duties and responsibilities. The Commission also determines that Empire's plan directly benefits the Company's customers given that a portion of employee pay is at risk, causing employees to recognize that superior performance will generate greater compensation.

In recognition of the flawed execution of the award plan, Empire indicated that it would be willing to include a five-year average that results in approximately \$251,000. As another alternative, Empire stated that it is willing to include instead a per-year average expenditure for its incentive awards, but deduct the \$323,000 from the total. This would make the issue worth approximately \$223,500 on a total company basis.

The Commission finds that Empire's alternative proposal to include approximately \$223,500 in cost of service is appropriate. This proposal allows the company to recover in rates a reasonable amount for the incentive awards, while also recognizing the flaws in the execution of the company's award plan.

4. CLASS COST OF SERVICE / RATE DESIGN

- A. What should be the appropriate method of class cost of service allocation in this case?**
- B. What is the appropriate allocation of any increase in revenues to customer classes?**
- C. What are the appropriate adjustments to rates for the various customer classes?**

¹The total amount of incentive awards was higher than this figure. However, Empire did not ask that it be allowed to recover incentive awards made to certain top management employees.

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D. What is the appropriate rate design treatment of the Interim Energy Charge (IEC)?

This issue was settled among all of the parties. A unanimous Stipulation and Agreement, covering this issue along with fuel and purchased power expense, was filed on June 4, 2001. That Stipulation and Agreement purports to resolve all of the above listed issues regarding Class Cost of Service and Rate Design. The parties have agreed that “the difference between any increase in the Company’s revenue requirement that is approved by the Commission and the revenues collected by the IEC will be allocated to each customer class on an equal percent of current revenues basis and reflected on all Empire Missouri rate schedules as an equal percentage increase (or decrease) to each rate component on each tariff.”

The Commission recognizes this approach as a means of essentially maintaining the same rate design as exists and is presently lawful and approved, since it increases each charge by an equal percentage basis.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of the issues raised in this case, pursuant to Section 536.060, RSMo 2000. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. See, *State ex rel. Rex Deffenderfer Enterprises, Inc. v. PSC*, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing on this issue in this case, and the Commission has satisfied itself that the Stipulation and Agreement represents a reasonable resolution of many complex issues, the Commission may grant the relief requested in the Stipulation and Agreement.

5. CAPITAL STRUCTURE / RATE OF RETURN

A. What capital structure is appropriate for Empire?

Empire proposes a capital structure for purposes of this case of 45% Common Stock Equity, 7.9% Trust Preferred, and 47.1% Long-term Debt. Staff and Public Counsel propose a capital structure of approximately 37.76% Common Stock Equity, 7.88% Trust Preferred, and 54.36% Long-term Debt, which is the June 30, 2001, actual capital structure of the Company. Empire contends that the actual capital structure as of June 30, 2001, is not a normal capital structure for Empire and therefore should not be used for ratemaking purposes. The Company argues that its proposed capital structure is representative of the capital structure that will be in effect during the period in which the Company’s new rates will be in effect.

On May 1999, Empire and UtiliCorp announced that they had executed an agreement for the merger of the two companies. The merger agreement provided that Empire could not issue any additional common equity prior to the closing of the merger. Following the merger announcement, the Company incurred a large amount of new long-term debt in order to finance construction of its new State Line Combined Cycle power plant and to redeem the outstanding preferred stock. These events combined to drive the Company’s common equity percentage down and its long-term debt percentage up. As of December 31, 2000, the Company’s capital structure was 39.80% Common Stock Equity, 0.00% Preferred Stock,

60.20% Long-term Debt, and 0.00 % Short-term Debt. On January 2, 2001, UtiliCorp announced that it was terminating the merger.

Empire argues that it is now moving towards a more balanced capital structure as it has reinstituted its dividend reinvestment plan and is planning to issue additional common equity later in 2001. However, Empire did not provide details regarding how many shares the Company would offer, at what price the shares would be offered, how much capital this would generate, or specifically what effect the new offering would have on the company's capital structure. The Company presented no evidence that it was firmly committed to issuing new common equity.

As noted above, the Company's capital structure was 37.76% Common Stock Equity, 7.88% Preferred Stock, and 54.36% Long-term Debt as of June 30, 2001. The percentage of common equity that is included in the Company's capital structure as of June 30, 2001, is unusually low when compared to this Company's past capital structure. Empire notes that since 1992 and prior to the proposed merger with UtiliCorp, Empire's common equity ratio ranged from 45% to 50%. However, Empire's common equity percentage as of June 30, 2001, is similar to that of other companies in the electric utility industry.

The Commission finds that the company's contention that it will increase its common equity percentage to 45% in the immediate or foreseeable future is not realistic. The Commission finds that the appropriate capital structure is the actual capital structure of June 30, 2001.

B. Return on Equity

Staff argues that the appropriate rate of return on common equity for this case is a range of 8.5% to 9.5%. Public Counsel supports a range of 10% to 10.25%, while Empire argues for a range of 11.5% to 12%.

Historically, the Commission has primarily relied upon the Discounted Cash Flow ("DCF") Method of determining the appropriate return on equity ("ROE") for a regulated utility company. The objective of the DCF Method is to determine the discount rate that equates anticipated future cash flows from a company's common stock to the current market price of the common stock. The Company, the Staff and the OPC all recommend that the Commission rely primarily upon the DCF Method to establish the appropriate return on equity in this case.

In simple terms, the DCF model consists of two components, the current dividend yield plus the expected sustainable growth rate.

The Company has paid annual dividends of \$1.28 per share every year from 1993 to 2000, and all parties agree that this is the proper figure to use in the calculations.

The DCF Method requires the use of a current market price for the company's common stock.

Company witness Dr. Donald A. Murry used stock price data for a historical period that included the first nine months of 2000. From this he concluded that the price to use in the DCF equation ranged from a low of \$18.90 to a high of \$27.10. The stock price data used by Dr. Murry was the oldest of these three, with some of the prices dating back to January 1, 2000, more than 20 months ago, and is not current.

OPC witness Mark Burdette used stock price data for the six-week historical period immediately preceding the preparation of his testimony, namely Febru-

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ary 16, 2001 to March 23, 2001. He determined that Empire's average stock price was \$19.52. Mr. Burdette testified that he averaged the Company's stock price over the most recent six weeks in order to reduce daily variability in the stock price.

Staff witness Roberta A. McKiddy used stock price data for a historical period from October 1, 2000 through March 4, 2001. The average price during that time period was \$24.25, but Ms. McKiddy recommended a yield of 5.50%, thus implicitly choosing a stock price of \$23.27.

The next step is the estimation of future growth. All parties agree that it is not likely that the Company's dividends will grow within the next few years. All parties also agree, however, that a company such as Empire may expect and experience growth, even when dividends do not increase. In such circumstances, the estimates of growth may take into consideration the expected growth of other factors, such as earnings per share or book value per share.

Staff witness McKiddy made five separate calculations of the historical growth rates of the Company's dividends per share, earnings per share and book value per share. She averaged the five results to determine that the Company's historical growth rate was 2.10% per year. Ms. McKiddy then averaged the projections of future growth rates from two outside sources to estimate that the Company's future growth rate will be 4.00% per year. Utilizing both her determination of the historical growth rate and her estimate of the future growth rate, she estimated the value of the growth factor to be 3.00% to 4.00% per year.

OPC witness Burdette calculated the Company's growth rate using both historical and projected rates for 1) earnings per share, 2) dividends per share, and 3) book value per share. Mr. Burdette performed this analysis on a group of six comparable companies. Based on this analysis, Mr. Burdette projected a growth rate of 3.5%. Public Counsel's recommended growth rate is squarely in the middle of Staff's recommended range for the growth rate (3%-4%).

Company witness Murry did not separately calculate historical growth and future growth, as did Ms. McKiddy and Mr. Burdette, but rather attempted to calculate a single growth rate for a single period that includes both historical results from 1994-1996 to the present and projected future results from the present until 2003-2005. He made no attempt in his analysis to consider growth rates for book value per share. Although he looked at the growth rate for dividends per share, he did not consider dividend growth in his analysis. Dr. Murry thus considered only the growth in earnings per share. He determined that the appropriate growth rate for Empire is 5.42% to 6.00% per year.

Dr. Murry's analysis of the growth factor is deficient because it depends entirely upon the growth of earnings per share, ignoring the growth of dividends per share and book value per share, and because it is heavily dependent upon projections of future growth, instead of utilizing historical data. The result is a growth rate that is much higher than Empire has ever achieved in recent years, and it is unreasonable to expect Empire to achieve it.

The Commission finds that Public Counsel's calculations are well reasoned and appropriate for this case. Public Counsel determined that a price of \$19.52 per share should be used in the DCF model. This \$19.52 stock price combined with the \$1.28 dividend results in a dividend yield of 6.56%, which when combined

with Public Counsel's growth rate of 3.5%, results in a rate of return range of 10.00% to 10.25%. The Commission finds that the appropriate rate of return on common equity is 10.00%.

6. STATE LINE POWER PLANT AND ENERGY CENTER

A. What are the appropriate capital costs for inclusion in rate base for the State Line Combined Cycle Unit?

This issue was settled among all the parties, and a Unanimous Stipulation and Agreement was filed on May 25, 2001. Staff filed Suggestions in Support of the Unanimous Stipulation and Agreement on June 1, 2001. A part of this stipulation is Empire's agreement that it waives its right to seek, in any subsequent rate proceeding in Missouri, recovery of \$3.984 million related to the Fru-Con construction contract regarding SLCC. The Commission explored the ramifications of the settlement by questioning several witnesses on the record.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of the issues raised in this case, pursuant to Section 536.060, RSMo 2000. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. See, *State ex rel. Rex Deffenderfer Enterprises, Inc. v. PSC*, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing on this issue in this case, and the Commission has satisfied itself that the Stipulation and Agreement represents a reasonable resolution of many complex issues, the Commission may grant the relief requested in the Stipulation and Agreement.

B. What are the appropriate expenses for Operation and Maintenance at the State Line Power Plant and the Empire Energy Center?

Staff performed an analysis of the operation and maintenance expenses at the Staff Line Power Plan and the Empire Energy Center as part of the true-up process. The parties announced to the Commission that there were no issues between them regarding operating and maintenance expense issues given the level of revenue requirement Staff was proposing as a result of the true-up audit. Therefore, since there are no identified issues on this topic, the Commission will accept the level of expenses in this category as reflected in the Staff's revenue requirement filing as part of the true-up.

C. What are the appropriate in-service criteria for determining whether the new State Line Combined Cycle Unit should be included in rate base?

On May 14, 2001, Empire, Staff and Public Counsel filed a Stipulation and Agreement Regarding In Service Criteria. No other party requested a hearing on this nonunanimous stipulation, so the Commission is allowed to treat it as if it were unanimous. 4 CSR 240-2.115(1).

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The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of the issues raised in this case, pursuant to Section 536.060, RSMo 2000. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. *See, State ex rel. Rex Deffenderfer Enterprises, Inc. v. PSC*, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing on this issue in this case, and the Commission has satisfied itself that the Stipulation and Agreement represents a reasonable resolution of many complex issues, the Commission may grant the relief requested in the Stipulation and Agreement.

7. FUEL AND PURCHASED POWER EXPENSE

What methodology for the recovery of fuel and purchased power expense should be adopted by the Commission in this case and what level(s) of fuel and purchased power expense should the Commission approve?

This issue was settled among all of the parties. A Unanimous Stipulation and Agreement, covering this issue, along with class cost of service and rate design, was filed on June 4, 2001. Staff filed suggestions in support of the agreement on June 5, 2001.

The Stipulation and Agreement provides that \$91,599,932 be included in Missouri jurisdictional cost of service on a permanent (i.e., not interim) basis. This figure was subject to true-up and was trueed up; the true-up figure is \$93,496,866. The Stipulation and Agreement also provided for the establishment of an Interim Energy Charge (IEC) to be reflected on all Empire rate schedules on an equal cents per kilowatt-hour basis at 0.54 cents per kWh, commencing October 1, 2001. The revenue from the IEC is to be collected by Empire on an interim and subject to true up and refund basis under the terms of the Stipulation and Agreement. Other Empire rate schedules which contain charges which assume a certain amount of kWh usage will also be affected by the IEC as provided by the Stipulation and Agreement.

The Stipulation and Agreement also provided for a change to the monthly credit for interruptible demand on the rate schedule applicable to Praxair.

During the course of the hearing, the Commission extensively questioned representatives of the Staff, Public Counsel, and Empire regarding the nature of the Stipulation and Agreement and whether it was in the public interest. The parties emphasized that Empire is different from other electric utilities in the state with regard to its dependence upon natural gas-fired generation and purchased power, especially with the addition of the natural gas-fired SLCC. The parties also noted that while some fuel costs are relatively stable, there has been recent volatility in the price of natural gas and purchased power, and there is great difficulty for anyone to attempt to predict with reasonable certainty what the market price of natural gas or purchased power will be at any given time in the future. The parties assured the Commission that the suggested resolution of this issue, for this particular company in this particular circumstance, is appropriate and reasonable, in that it incorporates a forecasted fuel method which the Commission has utilized in other forms in previous cases, and it includes a "true-up" to actual cost method which

the Commission finds appropriate in this situation for the protection of customers. Utilizing the “traditional” approach of attempting to ascertain a fixed cost for natural gas and purchased power prices carries with it the prospect of the ratepayers either paying significantly more or less than the actual costs. The Commission does not wish to subject either Empire or its customers to such potential extremes. The compromise approach fashioned by the parties in this proceeding ensures rate stability and seeks to prevent either “windfall” profits or dramatic losses by ensuring that actual fuel and purchased power costs are the basis for the process to be used.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of the issues raised in this case, pursuant to Section 536.060, RSMo 2000. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. *See, State ex rel. Rex Deffenderfer Enterprises, Inc. v. PSC*, 776 S.W.2d 494, 496 (Mo. App. 1989). Since no one has requested a hearing on this issue in this case, and the Commission has satisfied itself that the Stipulation and Agreement represents a reasonable resolution of many complex issues, the Commission may grant the relief requested in the Stipulation and Agreement. In so doing, however, the Commission does not intend to indicate that this particular approach to the recovery of fuel costs is appropriate for any other utility.

8. PROPERTY TAX ON ADDITIONAL PLANT IN SERVICE

Should the commission increase the total company revenue requirement by \$884,042 (Missouri jurisdictional) to account for property taxes on the \$122,479,047 in additional plant in service?

Empire and Staff disagree on the level of property tax expense that should be included in rates in this proceeding.

Staff calculated property taxes in this case by applying a property tax rate to the December 31, 2000, balances of electric property. Staff developed its property tax rate by dividing the amount of property taxes paid in 2000 by the total balance of Empire's electric property at January 1, 2000.

Empire advocates a position that goes beyond the year-end 2000 property balances in determining its property tax expense allowance by taking the balance of new plant in service and adding it to its system through the end of the true-up period to the property on which its property tax calculation was based. Nearly all this new plant is associated with the new State Line Combined Cycle (SLCC) Unit. That is, Empire argues that the revenue requirement should be increased by \$884,042 (which is the total company number of approximately \$1,027,000 multiplied by .8604, which is the jurisdictional allocator) to account for property taxes on the increased plant in service.

Staff contends that it is not appropriate to include property taxes related to the SLCC when those property taxes will not be assessed until January 1, 2002, and will not be actually paid for until December 31, 2002 (which is 15 months outside the operation-of-law date and 18 months outside the true-up period of June 30, 2001). Staff agrees that property taxes will be paid in the future, but Staff does not agree with the Company as to what value should be placed on this future

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expenditure. Staff alleges that the property taxes associated with this item do not meet the “known and measurable” standard that has consistently been used by the Commission over the years.

The Company argues that both its and Staff’s approaches to property taxes use “estimates,” and therefore the Commission should not be averse to using Empire’s estimate that extends further into the future. Staff points out what it believes are crucial differences between its estimate and the Company’s estimate. First, Staff applied a property tax rate (based upon past Empire experience) to the assessed value of Empire’s plant as of January 1, 2001, to determine its recommendation. The January 1, 2001, assessed value of plant is the basis for Empire’s actual property tax expense booked during 2001 – the true-up period for this case. Empire’s estimate, however, is based upon applying a property tax rate to plant that will not be assessed until January 2002, and for which the associated property tax expense will not even be booked by the Company until January 2002.

Praxair also opposes Empire’s approach to this issue. Among other things, Praxair points out that it is unreasonable for a utility to start charging ratepayers in October 2001 for costs that the Company will not pay until late December 2002. Empire is not being denied the ability to recover property taxes related to the new plant. Property taxes for the year 2000, paid in December 2000, were capitalized (added to the rate base for the new plant) and Empire is allowed to earn a return on and (through depreciation) return of the investment of that plant – recovery that begins in October 2001 with its new rates.

The Commission finds that the arguments of Staff and Praxair regarding the property tax issue are persuasive. Staff’s estimate of property taxes is based upon known and measurable factors and preserves appropriate matching of all revenue requirements, and is consistent with the Commission’s past practice. Empire’s position is not based upon known and measurable factors. In addition, it would be unreasonable for the Company to start charging ratepayers in October 2001 for (estimated) costs that the Company will not start paying until January 2002. The Commission determines that it will not increase the total company revenue requirement to account for property taxes on the additional plant in service.

9. TRUST PREFERRED STOCK (TOPrS)

Should the Issuance of Cost Associated with Empire’s TOPrS be Included as Part of the Embedded Cost of Debt?

There was substantial dispute at the true-up hearing over the embedded cost of trust preferred stock. Staff and Empire both contend that the embedded cost should be calculated in the same way that the embedded cost of debt is calculated.

The Company’s preferred stock consists of Trust-Originated Preferred Securities (TOPrS). TOPrS are a hybrid security and have characteristics of both debt and equity. Staff and the Company argue that the Commission should decide TOPrS related issues on a case-by-case basis as directed by the particular facts in each instance.

Public Counsel seeks a ruling in this case that Empire’s TOPrS are either debt or equity for all regulatory purposes. Public Counsel contends that it would have no objection to the Commission treating TOPrS as debt if the Commission did so

consistently for all regulatory purposes. Public Counsel argues that based on the Commission's past treatment of TOPrs, the Commission should treat Empire's TOPrS as equity. The basis for Public Counsel's position is a prior decision of this Commission in a case involving Missouri Gas Energy (MGE).² Staff witness McKiddy testified that that case is easily distinguished from the present one in that in the MGE case, the Commission regarded TOPrS as equity only for the purpose of meeting financial benchmarks. In that case, the Commission regarded TOPrS as equity only in order to determine that MGE met the criteria it had to meet in order to file a rate case; the Commission did not declare that TOPrS were equity for the purpose of calculating costs associated with it.

During the hearing, Public Counsel witness Burdette conceded that "absent a ruling from this Commission that they are equity, I believe TOPrS are debt."

Staff and Empire contend TOPrS are debt. Public Counsel conceded that the TOPrS are essentially debt. The Commission finds that the embedded costs of the TOPrS should be calculated the same way embedded cost of debt is calculated.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Empire is an investor-owned public utility engaged in the provision of electric service in the state of Missouri and, therefore, is an "electrical corporation" as defined under Section 386.020(15), RSMo 2000. The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of Empire pursuant to Section 386.250 and Chapter 393, RSMo.

Orders of the Commission must be based upon competent and substantial evidence on the record. Section 536.140, RSMo 2000.

All relevant factors must be considered in establishing rates for a public utility. *State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704, 718-719.

Section 393.150.2, RSMo 2000, provides that at a hearing involving a rate increase, the electrical company has the burden of proof to show that the proposed rate increase is just and reasonable.

Pursuant to Section 393.130.1, RSMo 2000, the Commission has the authority to prohibit the implementation of electric service rates that are unjust or unreasonable.

Based upon the findings of fact and the following conclusions of law, the Commission concludes that in order to set just and reasonable rates, Empire is authorized to file tariff sheets consistent with this order. Accordingly, the Commission also concludes that the tariffs submitted by Empire on November 3, 2000, are not supported by competent and substantial evidence and shall be rejected.

I. COST OF SERVICE - DEPRECIATION

Empire is entitled to the opportunity to recover in rates the depreciation that it incurs and the Commission has broad discretion in determining depreciation. See *State ex rel. Capital City Water Co. v. Public Service Commission of Missouri*,

²Case No. GR-96-285, 5 Mo. P.S.C. 3d 437.

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298 Mo. 524, 252 S.W. 446, 451-452 (Mo. banc 1922). The Missouri Supreme Court, in two separate rate cases involving regulated utilities, has approved the explanation of depreciation stated by the U.S. Supreme Court in *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 54 S.Ct. 658 (1934) that follows:

Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. Annual depreciation is the loss which takes place in a year. In determining reasonable rates for supplying public service, it is proper to include in the operating expenses, that is, in the cost of producing the service, an allowance for consumption of capital in order to maintain the integrity of the investment in the service rendered.

(*State ex. rel Martigney Creek Sewer Co. v. Public Service Commission*, 537 S.W.2d 388, 397 (Mo. banc 1976); *State ex rel City of St. Louis v. Public Service Commission*, 341 Mo. 920, 110 S.W.2d 749, 767-768 (banc 1937)). The Commission finds that, in this particular case, Staff's position regarding Cost of Service - Depreciation is more persuasive. However, the Commission's conclusion in this case should not be taken as a final endorsement of Staff's approach. Both the approach adopted by Staff and by the Company have merit, and the Commission will use the one that fits the particular circumstances.

2. COST OF SERVICE - BAD DEBTS

The Commission has the ability to determine the appropriate level of expenses for a utility's cost of service. The Commission concludes that the record evidence does not demonstrate a correlation between revenues and bad debt expense. The Commission concludes that Empire's bad debt expense should not be adjusted upward by .25% to reflect the additional revenues resulting from this proceeding.

3. COST OF SERVICE - PAYROLL - INCENTIVE PAY

The Commission concludes that the \$223,500 in incentive payments at issue were made to employees who did in fact achieve goals which were beyond their normal job duties and responsibilities and thus the \$223,500 should be included in rates in this proceeding.

4. CLASS COST OF SERVICE / RATE DESIGN

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case, pursuant to Section 536.060, RSMo 2000. The Commission accepts the Unanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense and Class Cost of Service and Rate Design as the resolution of all issues contemplated thereby.

5. CAPITAL STRUCTURE / RATE OF RETURN

The Commission concludes that the appropriate capital structure for Empire for purposes of this case is the Company's actual capital structure as of June 30, 2001, which is 37.76% Common Stock Equity, 7.88% Preferred Stock, and 54.36%

Long-Term Debt. The Commission concludes that the appropriate return on common equity for Empire in this case is 10.00 percent.

6. STATE LINE POWER PLANT AND ENERGY CENTER

A. What are the appropriate capital costs for inclusion in rate base for the State Line Combined Cycle Unit?

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case, pursuant to Section 536.060, RSMo 2000. The Commission accepts the Unanimous Stipulation and Agreement as to State Line Combined Cycle Unit Capital Costs as the resolution of all issues contemplated thereby.

B. What are the appropriate expenses for Operation and Maintenance at the State Line Power Plant and the Empire Energy Center?

The Commission concludes that this is no longer an issue, given Empire's acceptance of Staff's position on this issue in true-up.

C. What are the appropriate in-service criteria for determining whether the new State Line Combined Cycle Unit should be included in rate base?

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case, pursuant to Section 536.060, RSMo 2000. The Commission accepts the Stipulation and Agreement Regarding In-Service Criteria as the resolution of all issues contemplated thereby.

7. FUEL AND PURCHASED POWER EXPENSE

What Methodology for the Recovery of Fuel and Purchased Power Expense Should be Adopted by the Commission in this Case and What Level(s) of Fuel and Purchased Power Expense Should the Commission Approve?

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case, pursuant to Section 536.060, RSMo 2000. The Commission accepts the Unanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense and Class Cost of Service and Rate Design as the resolution of all issues contemplated thereby.

8. PROPERTY TAX FOR ADDITIONAL PLANT IN SERVICE

Should the Commission Increase the Total Company Revenue Requirement to Account for Property Taxes on the Additional Plant in-Service?

The record contains competent and substantial evidence to support the fact that Staff's treatment of property taxes is reasonable and appropriate. (Mo. Const., Art.V, Sec. 18 (1945), as amended; Section 393.130.1 RSMo 2000). The Commission concludes that Empire should not be allowed to recover in rates the annual property taxes associated with its additional plant in-service.

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9. TRUST PREFERRED STOCK (TOPrS)**Should the Issuance Costs Associated with Empire's TOPrS be Included as Part of the Embedded Cost of Debt?**

The Commission concludes that the issuance costs associated with Empire's Trust Originated Preferred Securities should be included as part of the embedded cost of debt and amortized over their life in accordance with GAAP (generally accepted accounting principles).

IT IS THEREFORE ORDERED:

1. That the Commission adopts the average service lives that are attached as Appendix A to this Report and Order.
2. That the Commission hereby adopts the Stipulation and Agreement Regarding In-service Criteria, filed May 14, 2001, as the appropriate resolution of the issues therein.
3. That the Commission hereby adopts the Unanimous Stipulation and Agreement as to State Line Combined Cycle Unit Capital Costs, filed May 25, 2001, as the appropriate resolution of the issues therein.
4. That the Commission hereby adopts the Unanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense and Rate Design, filed June 4, 2001, as the appropriate resolution of the issues therein.
5. That Praxair, Inc.'s May 18, 2001, request for a hearing on the nonunanimous stipulation and agreement regarding the fuel and purchased power issues is denied.
6. That the joint Motion to Schedule Hearing on Fuel and Purchased Power issues, filed on May 23, 2001, by The Empire District Electric Company and the Office of the Public Counsel, is denied.
7. That the motion for leave to file the true-up reconciliation of the parties' positions on the revenue requirement issues out of time, filed by the Staff of the Commission on August 31, 2001, is granted.
8. That all pending motions not specifically ruled on herein are denied.
9. That the proposed tariff sheets filed by The Empire District Electric Company on November 3, 2000, are rejected.
10. That The Empire District Electric Company is authorized to file proposed tariff sheets in compliance with this Report and Order.
11. That this Report and Order shall become effective on October 2, 2001.

Simmons, Ch., and Lumpe, C., concur; Gaw, C., concurs,
with concurring opinion to follow; Murray, C., dissents,
with dissenting opinion attached; certify compliance
with the provisions of Section 536.080, RSMo 2000.

Editor's Note: Appendix A, the average service lives, has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

On September 20, 2001, this Commission issued, by means of a 3-1 vote, a Report and Order regarding The Empire District Electric Company's proposed rate increase. Because the Report and Order rejects the Company's proposed tariff, I reluctantly concur in the Commission's decision.

Although I do not fully support the Report and Order, I am compelled to vote for its issuance as the effect of my voting against it would result in a split decision of the Commission. In that case, the Company's proposed tariff would have gone into effect, giving the Company a greater permanent revenue increase.

The most significant portion of the revenue increase comes as a result of the Stipulation and Agreements signed by the parties, including Public Counsel and Staff. For example, the Stipulation and Agreement regarding the State Line Combined Cycle Unit Capital Cost, filed May 25, 2001, allows the substantial cost overruns of the State Line Combined Cycle Power Plant to be passed on to the ratepayers. Questions concerning the prudence of Empire's decisions in this area have not been resolved to my satisfaction. I am not convinced that the cost overruns associated with the plant are justified, nor that they should be borne by ratepayers.

I also have concerns with the Unanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense and Class Cost of Service. This agreement was entered into during a period when related legislation was proposed and passed by the Legislature, but before its subsequent veto by the Governor. Public Counsel and Staff both indicated that the agreement on Fuel and Purchased Power Expense was preferable to the 2001 legislation promoted by Empire. I am not convinced that all the parties would have entered into the agreement if their discussions had taken place after the legislation's veto, nor am I totally persuaded that this portion of the Stipulation and Agreement is in the public interest.

The Interim Energy Charge created by the Stipulation and Agreement Regarding Fuel and Purchased Power Expense is an experimental program. Customers of Empire may someday recover a portion of the fuel charges they pay under this Stipulation and Agreement; however, families are often not in a position to advance more for their utilities than they would have normally paid when not under the experimental program. I am troubled that is a possible result in this case.

In spite of my concerns, I have no viable option but to vote with the majority to approve the Report and Order and prevent the company's original request from going into effect.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

Because of my disagreement with the majority on the issue of depreciation, I cannot support today's Report and Order.

On December 21, 1999, in Case No. GR-99-315, this Commission found in favor of Staff's proposed treatment of net salvage as an expense. In doing so, we denied Laclede Gas Company the right to traditional treatment of net salvage as a part of the cost of the asset that is depreciated over the life of the asset. While I voted with the majority at that time, I dissented from the majority's reaffirmation of

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that decision after it was remanded to the Commission for “findings of fact sufficient to support resolution of the net salvage issue.” See *Dissenting Opinion of Commissioner Connie Murray, Second Report and Order*, Case No. GR-99-315, June 28, 2001.

Since the Commission’s first decision to embrace Staff’s radical new depreciation policy, Staff has attempted to convince the Commission to employ that policy across the board. Staff has not been uniformly successful in that effort. See *In the matter of St. Louis County Water Company for Authority to File Tariffs Reflecting Increased Rates for Water Service*, Case No. WR-2000-844, May 3, 2001.

In *St. Louis County Water Company*, the Commission stated: “Depreciation is the loss in service value primarily due to age and use of capital assets used to provide water service to the Company’s customers. Depreciation accounting is the system that spreads the cost of these assets over their useful lives. In the whole life method of accounting, net salvage is accounted for in depreciation rates, and in straight line whole life depreciation, the original cost of an asset less net salvage is allocated in equal amounts to each year of an asset’s service life. Net salvage is the difference between the value of retired plant and the cost of removing that plant. If it costs more to remove a piece of plant than that piece’s value, net salvage is negative. Conversely, if at retirement a piece of plant has value in excess of the cost of removal, net salvage is positive.” *Id.*

In the traditional whole life method of depreciation, net salvage is used to offset the original plant costs in the setting of depreciation rates. Where net salvage is positive, it reduces the amount recovered from ratepayers who benefit from the property. Where net salvage is negative, the costs of removal are spread evenly over the life of the property in order that ratepayers who benefit from the property will pay those removal costs.

The majority has adopted Staff’s proposal to address cost of removal and resulting net salvage associated with utility property in a way that is inconsistent with the whole life method that has been used by the Commission in setting Empire’s depreciation rates in the past. The method adopted by the majority takes the cost of removal, which is sometimes substantial, and rather than provide for its collection over the life of a piece of utility property, instead provides for its recovery after the plant has been retired.

The majority’s decision to remove net salvage from the depreciation calculation and only reflect in rates expenditures as they are made runs contrary to the principal that ratepayers should be responsible for paying the costs they cause. The whole life method, including its treatment of net salvage, allows net salvage to impact rates over the entire life of a piece of property such that all customers that benefit from that property share in the costs or mitigation of that property. This same process promotes stability of rates by spreading the net salvage and avoiding cost spikes that then must be reflected in rates over a comparatively short period of time.

I disagree with the finding that a lapse of time between retirement and removal, as in the case of Unit 6 at Empire’s Riverton site, provides sufficient grounds to reject Empire’s treatment of net salvage cost. To the contrary, Empire’s decision to leave retired plant until other units are retired and removed appropriately takes into consideration the economies of removing units en masse and emphasizes the intergenerational inequity of Staff’s position.

The majority appears troubled by the fact that the whole life treatment of net salvage relies on projections of when future events will occur and on the costs associated with those future events. Establishing depreciation rates necessarily involves an analysis of expected future events such as useful life, salvage value and cost of removal.

The Commission has recognized that, because of the estimates and unknowns involved with depreciation analysis, it is not unheard of for the depreciation rates to miss their goal to some extent. See *In the matter of St. Louis County Water Company's tariff revisions designed to increase rates*, 4 Mo.P.S.C.3d 94, 102-103 (1995). I am comfortable that there are sufficient checks and balances built into the regulatory process to prevent any adverse ratepayer impact. The most significant of these checks and balances is the fact that amounts added to depreciation reserve are deducted from original plant in determining rate base for ratemaking purposes. If a depreciation rate should be higher than is necessary for a period of time, it builds the reserve more quickly and thereby lowers the utility's rate base more quickly. This is also the case during any period after retirement and before removal is actually executed. Thus, customers are, in effect, compensated in the interim through rate base treatment.

There are other checks and balances in the process. Commission rule, 4 CSR 240-20.030(5), requires electrical corporations to perform and provide to the Commission Staff and Office of the Public Counsel, every five years, a depreciation study, database and property unit catalog that will address average service lives, net salvage and depreciation rates. As a result of these studies, net salvage amounts are periodically reviewed and reduced where necessary. In this case, Empire witness Loos reduced substantially some of the net salvage allowances that had been employed in existing rates. There are also examples of *negative* depreciation rates that have been proposed by Empire where past depreciation has exceeded experience.

The Commission need not throw out the entire whole life treatment of net salvage because the net salvage numbers are estimates. There are many opportunities to reassess, analyze and adjust depreciation rates to include updated and reasonable net salvage computations. This is something that has gone on for many years. To the extent that the Company, Staff, Office of the Public Counsel and other parties do not agree as to what or when adjustments should be made, the Commission is available to review the evidence and to render a decision that will settle the matter.

Empire should be allowed to include the cost of net salvage in its calculation of whole life depreciation for both the existing plant and the SLCC plant. Therefore, I respectfully dissent.

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In the matter of Laclede Gas Company's Tariff Filing to Implement an Experimental Fixed Price Plan and Other Modifications to Its Gas Supply Incentive Plan.*

*Case No. GT-2001-329
Decided September 20, 2001*

Gas §§1, 17.2. Laclede's Gas Supply Incentive Plan allowed to expire after Commission determined that the GSIP did not properly balance ratepayer and shareholder interests.

APPEARANCES

Michael C. Pendergast, Assistant Vice President and Associate General Counsel, 720 Olive Street, Room 1520, St. Louis, Missouri 63101, and *James M. Fischer*, Attorney at Law, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Laclede Gas Company.

Thomas M. Byrne, Associate General Counsel, One Ameren Plaza, 1901 Chouteau Avenue, P.O. Box 66149, St. Louis, Missouri 63166, for Union Electric Company d/b/a AmerenUE.

Diana M. Vuylsteke, Attorney at Law, Bryan Cave, LLP, 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102, for Missouri Industrial Energy Consumers.

Douglas E. Micheel, Senior Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for Office of the Public Counsel and the Public.

Thomas R. Schwarz, Jr., Deputy General Counsel, and *David A. Meyer*, Associate General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

SENIOR REGULATORY LAW JUDGE: Bill Hopkins

REPORT AND ORDER

This report and order allows the gas supply incentive program (GSIP) of Laclede Gas Company to expire.

Summary

Laclede Gas Company's current GSIP will expire of its own terms on October 17, 2001, unless the Commission extends it. Laclede filed new tariffs to maintain the program for the future. The Commission determines that Laclede did not sustain its burden of proof that the GSIP strikes the proper balance between

*This order contains corrections approved by the Commission in an order issued on October 1, 2001. On February 19, 2002, the Commission issued an order which denied a rehearing and a request for clarification. On February 20, 2002, this case was appealed by Cole County Circuit Court (02CV323393).

ratepayer and shareholder. Therefore, the GSIP will be allowed to expire. The goal of providing lower prices for the ratepayer has not been met.

Parties

The parties to this action are Laclede Gas Company, the Office of the Public Counsel, and the Staff of the Missouri Public Service Commission. At the time of the hearing, the Missouri Industrial Energy Consumers and Union Electric Company, d/b/a AmerenUE, remained as intervenors.

Brief Procedural History

On November 17, 2000, Laclede filed a tariff proposing modifications to and extending the duration of its GSIP, which would otherwise expire on October 17, 2001.

On December 11, 2000, Staff filed a motion to suspend Laclede's tariff filing. The Commission granted Staff's motion, suspended the effective date of the tariff until April 17, 2001, and established a case to address the GSIP provisions. On February 15, 2001, the Commission suspended the effective date of the tariff until October 17, 2001, and then conducted an evidentiary hearing from June 18 to 22, 2001.

Conclusions of Law

In making this decision, the Commission must first determine which party has the burden of proof.

Well-settled Missouri law is that, in a non-criminal case, the party asserting the affirmative of the issue bears the burden of proof.¹ The *Gamble* case held that the proponent of an order in a contested case before an administrative tribunal has the burden of proof in sustaining the reasons for the order.² The *Monsanto* case, where Laclede was a party, indicates that the proponent of a tariff has the burden of proof.³ The court stated:

Laclede filed the tariffs here in question using the existing rate design. In the suspension order and notice of proceedings dated January 18, 1983, the Commission noted that the Company bore the burden of proof before the Commission and ordered the Company "to provide evidence and argument sufficient for the Commission to determine... the reasonableness of the Company's rate design."

Thus, in this case, Laclede had the burden of proof but failed to sustain it because, upon examining the whole record, the Commission cannot find competent and substantial evidence presented by Laclede for its position.

¹ *Michaelson v. Wolf*, 364 Mo. 356, 261 S.W.2d 918, 924[5] (1953).

² *Gamble v. Hoffman*, 695 S.W.2d 503 (MoApp 1985).

³ *State ex rel. Monsanto, et al. v. Public Service Com'n of Missouri*, 716 S.W.2d 791 (Mo.banc 1986) at 795.

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The Commission must draw a reasonable conclusion based on competent and substantial evidence presented before it. The Commission's order has a presumption of validity, and the burden is on the party attacking it to prove its invalidity.

Judicial review of the Commission's order is conducted using a two-part test.

First, the reviewing court must determine whether the Commission's order is lawful. An order's lawfulness depends on whether the Commission's decision was statutorily authorized. When determining whether the order is lawful, a reviewing court exercises independent judgment and must correct erroneous interpretations of the law.

Second, a reviewing court must determine whether the Commission's order was reasonable. An order's reasonableness depends on whether it was supported by competent and substantial evidence on the whole record. A reviewing court must determine whether the decision was arbitrary, capricious, or unreasonable, or whether the Commission abused its discretion. "Substantial evidence" is competent evidence -- i.e., evidence that is admissible, relevant, and material, which, if also true, has a probative force on the issues. If the Commission's decision is based on purely factual issues, a reviewing court may not substitute its judgment for that of the Commission.⁴

This order is prima facie lawful, reasonable, and authorized by statute.⁵

The Commission must protect the public interest, ensure that Laclede's rates are just and reasonable, and ensure that Laclede provides safe and adequate service to the public.⁶

The GSIP was established to permit Laclede and its ratepayers to share in specified savings and revenues realized by Laclede in acquiring, utilizing, and managing its system gas supply assets.⁷

A decision to reinstitute or incorporate revisions to the GSIP is not supported by competent and substantial evidence before the Commission. It would be unlawful for the Commission to consider only a few non gas cost elements outside of a rate case.⁸

The *MGUA* case implies that for the Commission to authorize a gas cost incentive program proposed by a gas company, the program must be of benefit both to the company and to the ratepayers. The court in that case stated: "The [Commission] found that the experimental gas cost incentive mechanism proposed by [the company], as modified by the [Commission] in its order, was authorized and was of benefit to [the company] and to ratepayers."⁹

⁴ See *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 470 (MoApp 1998).

⁵ Section 286.270, RSMo 2000. (References to Sections of the Revised Statutes of Missouri, unless otherwise specified, are to the revision of the year 2000.)

⁶ Sections 393.130 and 393.140.

⁷ *In the matter of Laclede Gas Company*, 5 Mo.P.S.C. 3d 108, 130 (1996).

⁸ *Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W. 2d 41 (Mo. 1979); *Midwest Gas Users' Association*, *supra*.

⁹ *Midwest Gas Users' Association*, at 475.

As a whole, Laclede's case is not supported by competent and substantial evidence before the Commission that would tend to show that its GSIP -- admittedly beneficial to Laclede -- is also beneficial to its ratepayers. Examples of Laclede's failure to produce this type of competent and substantial evidence on three issues will suffice.

Merchant function: Laclede complained that without the GSIP, it faced substantial risk of losses from its merchant function. The claim, however, was not supported by Laclede Witness Glenn W. Buck's testimony. The "merchant-related function," originally estimated by Buck in the surrebuttal phase to have a value of \$12.3 million not recovered through the purchased gas adjustment mechanism, dropped to \$10 million by the time of the hearing; correspondingly, the estimate of \$4.8 million being borne by shareholders dropped to \$4.1 million. Staff persuasively argued that the amount borne by shareholders is actually smaller, since Laclede did not take into account the concept that a shareholder does not absorb costs not reimbursed by ratepayers on a dollar-for-dollar basis. Rather, according to Staff, Laclede is able to offset its profits in other areas, with the unreimbursed expenses from its "merchant function," reducing the ultimate liability passed on to shareholders by the amount of the saved taxes. In other words, in Staff's view, Laclede is able to offset the increase in bad debts, and the corresponding interest costs, against profits and does not have to pay the 40% in corporate income tax it otherwise would have had to pay on those profits. The Commission agrees with Staff on this point.

Benchmarks for pipeline discounts: Laclede Witness Bruce B. Henning suggested that the Commission should retain the current "achievable" baseline for pipeline discounts. The witness relied on information provided by Laclede's personnel and did not do an independent investigation of Laclede's pipeline contracting practices or review its contracts. According to Staff, those contracts revealed that Laclede receives discounts from several pipelines and these discounts antedate the GSIP. Staff pointed out that the discounts have generated large amounts of money for Laclede, but because the witness did not analyze Laclede's transportation contracts, his analysis did not take into account customer mix; peak shaving abilities; Laclede's status as a captive local distribution company; and storage capabilities. The witness, according to Staff, relied on historical data to develop his opinions, but not data specific to Laclede, thus making the witness' analysis overly general and of little use. The Commission agrees with Staff on this point.

Protection of gas supply by fixed price instruments: Laclede failed to demonstrate how its proposal to subject 10 BCF to 25 BCF of its gas supply to protection by fixed price instruments is appropriate. Laclede failed to produce any documents or written analyses that supported this specific level, or any other level, of fixed price protection. When questioned why Laclede had absolutely no written analysis supporting its proposal, Laclede Witness Kenneth J. Neises stated: "It's not complicated. This is not rocket science, nor is it any kind of science. Essentially you're simply looking at -- it's very simple." Public Counsel maintained that, if determining the appropriate amount of gas supply is not "rocket science" and is "very simple," the Commission ought not give its imprimatur to a specific mandated

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level of fixed price instruments. If Laclede has confidence in these purchasing guidelines, in Public Counsel's view, then Laclede can certainly follow those guidelines without a specific Commission mandate. Public Counsel concludes that absent a mandate to follow a rigid rule, Laclede would retain the flexibility to alter the volumes protected by fixed price instruments in response to changing market conditions. The Commission agrees with Public Counsel on this point.

The Commission suspended the proposed tariff filing and held the evidentiary hearing under the authority of Section 393.150(1). This statute requires that the Commission, whenever a gas corporation files a proposed tariff, hold a hearing to determine if the proposed tariff should be implemented. The Commission may suspend the effective date of the proposed new tariff during the pendency of the hearing. The statute states:

Whenever there shall be filed with the commission by any gas corporation...any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have...a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission...may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing...the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper....

The Commission concludes that the proposed tariff is not proper in that it is not just and reasonable and not in the public interest.

Findings of Fact

The Missouri Public Service Commission makes its findings of fact having considered all of the competent and substantial evidence upon the whole record. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. The Commission makes the following findings of fact:

(1) In fiscal years 1997 to 2000, GSIP earnings comprise between 14% and 22.9% of Laclede's total net income, after taxes. Laclede has incorporated the

earnings into its overall earnings program, which was never its purpose. For example, Laclede Witness Kenneth J. Neises testified:

[I]t should be no secret to anybody that we strongly believe in the GSIP, and we are hopeful that this Commission will continue it and move it forward, and we have it in our planning process. If it isn't approved, this whole strategy goes down the drain, and I think, as the chart Mr. Pendergast used this morning demonstrates, GSIP earnings are as important to shareholders as they are to customers....[W]e've come to the point that without them we can't make our authorized return. So we built it in. We're hopeful that the Commission will approve it as part of our plan, just as we built in a rate case and as we built in our weather normalization clause in this process. All of those elements are critical to the future financial health of this company.

(2) Discounts, such as transportation discounts, can be expected to remain a part of the purchasing process for some time to come. Laclede will continue to have the opportunity to make profits through off system sales and temporary releases of pipeline capacity. For example, Laclede Witness Bruce B. Henning testified: "[W]ithin the context of our particular view of the market, we're not going to be in a position where there will be no discounts over the next decade. And, as such, the role of maximizing potential discounts still has a role, in my opinion, in a GSIP."

(3) Laclede calculated the unrecovered value of its merchant function, incorporating financing costs associated with underground storage and propane inventories, Cash Working Capital effects of natural gas purchases, the gas cost portion of customer deposits, carrying costs associated with deferred gas costs outside the GSIP and Price Stabilization Programs, gas cost related portion of payment plan arrangements under the Cold Weather Rule, and the gas cost component of uncollectable accounts. The calculation overstates the value because it disregards the effects of tax deductions for losses, recovery provisions contained in Laclede's tariff, and additional profits Laclede obtains through increased consumption, as well as the fact that Laclede may in fact recover some of its costs either from the ratepayer or through its pending rate case. For example, when Laclede Witness Glenn W. Buck was asked if Laclede had used the after tax return on rate base for deferred gas costs instead of the short term debt rate, he testified: "That's correct." Buck went on to say:

Based on the prior three [actual cost adjustment] years, there's a level of deferred gas costs that essentially is, I don't want to use the term free, but there is...over- or under-recoveries up to that amount. No [deferred gas cost] interest is applied to above that amount [i.e., \$17 million; the amount of deferred gas cost

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that Laclede is incurring now], and that's the only incremental piece there would be interest charges associated there to either additional costs deferred for subsequent recovery from our customers or, conversely, deferred costs or deferred interest charges to be refunded to our customers in the subsequent period....

(4) According to the information on Laclede Exhibit 18, the current GSIP has not created any significant savings on the demand cost of gas, but has generated large profits for Laclede last winter. The gas procurement mechanism's impact on consumers, according to the information on Laclede in Exhibit 35, is approximately 2 cents per dollar spent on gas. This amount is not significant.

(5) Allowing Laclede to shift discounts into years where benchmarks are more difficult to meet, at the expense of lowering customers' rates, is not in the ratepayers' interest. According to the information on Laclede in Exhibit 18, ratepayers are worse off with respect to transportation discounts under the GSIP than they would have been without the GSIP.

(6) Rewarding Laclede for merely tracking the highly volatile index cost of gas has not served the ratepayers' interest. Providing an incentive to Laclede to buy gas according to index, rather than taking a broader view and considering fixed price instruments, effectively limits Laclede's options, potentially causes ratepayers to pay higher costs than necessary, and is not in the public interest. For example, Staff Witness Robert Schallenberg testified:

[T]he current GSIP with the safe harbor that [it's] based on as long as gas is purchased within a benchmark that goes from the index, provides a safety net or definitely encourages a company to buy index-based price gas with the adders being within the parameters of the...adders that you have in the present GSIP. It definitely puts the company at risk if it were to buy any fixed price instrument, because the index could move below the fixed price and, therefore, it would be at risk....It would discourage Laclede [from buying] a fixed price instrument. So, by definition, if index-based gas is going to produce your best result in a given winter, then it will...be fine. If index-based gas produces a bad result, then it won't be. And last winter, riding the index was...not a good result for consumers.

(7) Laclede has failed to document its decisions in the procurement process. For example, Laclede Witness Kenneth J. Neises, when asked if anyone at Laclede ever issued a memorandum concerning procurement decisions, testified:

We do not have large staffs...churning out all kinds of documents because the principals, the people who are going to be

carrying out [procurement] decisions, are the same people that are present in the room [when the procurements discussions take place].

(8) The Commission's finding year after year (e.g., in cases number GT-99-303, GO-2000-395, and GT-2001-329), that the GSIP principles must be modified, does not serve or promote the public interest or permit Laclede to properly plan its commodity purchasing.

(9) The preapproval process is not appropriate. A company's management personnel, who have the best and most timely access to information, should make decisions about a particular gas supply portfolio, and can take into account unforeseeable circumstances and current market conditions, if not forced to abide by preset parameters. Preapproval could discourage Laclede from taking opportunities to secure fixed price contracts that would produce reasonable price protection for customers.

(10) The public will benefit more from a comprehensive purchasing program that focuses on the delivered cost of gas and reliability, rather than a program driven by individual, compartmentalized benchmarks. A comprehensive program defines and measures how ratepayers are benefited, incorporates weather risk into the purchasing provisions, and establishes measurements that encourage proper actions and discourage inaction or ineffective actions. A comprehensive program also incorporates the effects of purchasing decisions, transportation availability, transportation costs, supply availability, supply costs, and the costs of hedging mechanisms.

Thus, given the deficiencies of current GSIP, the Commission will allow it to expire. The Commission notes, however, that well-designed GSIPs -- if guidelines for such designs can be determined -- would be acceptable under Commission policy. The Commission, to ensure that such designs are well-designed, may await the results of its task force established for this purpose.

IT IS THEREFORE ORDERED:

1. That the Gas Supply Incentive Program of Laclede Gas Company will expire by its own terms on October 17, 2001.
2. That the proposed tariff filing on November 17, 2000, by Laclede Gas Company, under tariff number 200100572, is rejected. The rejected tariff sheets are:

P.S.C. Mo. No. 5 Consolidated
Fifth Revised Sheet No. 28-a
Third Revised Sheet No. 28-b
Original Sheet No. 28-b.1
Original Sheet No. 28-b.2

3. That competent and substantial evidence upon the record as a whole does not support an extension of Laclede Gas Company's Gas Supply Incentive Program.

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4. That all motions not previously ruled upon by the Commission in this case are hereby denied, all objections not previously ruled upon are hereby overruled, and all evidence, the admission of which was not specifically denied, is admitted.
5. That this order will become effective on October 17, 2001.
6. That this case may be closed on October 18, 2001.

Simmons, Ch., Lumpe and Gaw, CC., concur;
Murray, C., dissents, with dissenting opinion attached;
certify compliance with the provisions of
Section 536.080, RSMo 2000.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

In order to stabilize natural gas prices for ratepayers it is appropriate for the Commission to give natural gas companies incentives to find lower prices and use alternative purchasing methods. I must dissent from the majority's decision to reject the proposed extension of Laclede's gas supply incentive plan.

The gas supply incentive plan that the Commission first approved for Laclede in 1996 for a three-year term and extended, with modifications, for two additional years has provided significant benefits to both Laclede's ratepayers and shareholders. Contrary to the arguments of Staff and the Public Counsel, benefits to shareholders do not equate to detriments to ratepayers. Financial integrity of the utility is necessary to provide safe and reliable service, and an incentive plan that improves the company's bottom line may also be a plan that increases benefits to ratepayers. Indeed, Laclede's was such an incentive plan. The Commission has in the past approved Laclede's gas supply incentive plan in order to serve the public interest. The incentive program has been a win/win situation.

The modifications that Laclede proposes to the plan in this case are in response to concerns raised by Staff or the Public Counsel, and make the benefits of the plan apportion even more favorably to the ratepayers. Those modifications include significant reduction of the share of benefits that Laclede is permitted to retain; commitment to contribute a portion of Laclede's retained benefits to funding energy assistance for low-income customers; removal of off-system sales revenues from base rates for inclusion in the gas supply incentive plan; retention of a capped amount by Laclede; explicit permission of further modifications in the event the Commission ultimately adopts any recommendations from its Gas Cost Recovery Task Force that are inconsistent with the gas supply incentive plan provisions; and, significant alteration of the gas supply commodity component in order to provide additional customer price protection.

I do not dispute that it may be possible to devise incentive mechanisms that would be superior to the one proposed here. The one proposed by Laclede, however, is a reasonable, workable plan that the evidence shows to be in the public interest. No other reasonable, workable incentive plan is before us in this case. While I applaud the majority's desire to encourage a collaborative set of incentive guidelines that all local distribution companies can employ, I am concerned that

such guidelines will not be established in time for application to this winter season. Furthermore, language that would explicitly permit further modifications of Laclede's gas supply incentive plan to conform to any Commission adoption of the Gas Recovery Task Force recommendations, should remove any concern that approval of this plan will result in inconsistencies between the Commission's ultimate policy determinations and this plan.

Laclede's September 18, 2001 request that the Commission receive into evidence the Final Report of the Missouri Public Service Commission's Natural Gas Commodity Price Task Force states that a number of the recommendations and sections of the Task Force Report are relevant and material to the issues raised in this proceeding. Particularly, Laclede cites the Task Force's strong preference for use of financial incentives. Laclede points out that it would be consistent with the Task Force's recommendation for the Commission to authorize Laclede's proposed GSIP, as a bridge to any final incentive structure that might be ultimately adopted by the Commission as a result of the Task Force Report. Approval, therefore, of extending the gas supply incentive plan with the modifications proposed by Laclede would be in the public interest.

For these reasons, I respectfully dissent.

In the Matter of Missouri Gas Energy's Application for Approval of Certain Matters Pertaining to Ongoing Cast Iron Main and Service/yard Replacement as a Part of its Safety Line Replacement Program.

*Case No. GO-2002-50
Decided September 20, 2001*

Gas §35. The Commission approved a modification of Missouri Gas Energy's Safety Line Replacement Program that included a new long-term replacement program for cast iron mains, and affected the replacement of copper service lines.

Gas §34. The Commission determined that the costs associated with Missouri Gas Energy's modified Safety Line Replacement Program are eligible for deferral under any Accounting Authority Order granted by the Commission to Missouri Gas Energy, including the Accounting Authority Order granted in Case No. GR-2001-292.

ORDER APPROVING APPLICATION

On July 30, 2001, Missouri Gas Energy (MGE), a division of Southern Union Company, filed an application asking the Commission to approve certain modifications to its ongoing cast iron main, and service line and yard line replacement, as a part of its Safety Line Replacement Program. This order approves that application.

The Commission issued an Order and Notice on August 1, giving notice of MGE's application to the County Commission of the counties in MGE's service territory, to the members of the general assembly who represent the counties in MGE's service territory, and to the newspapers that serve the counties in MGE's

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service territory. That order also directed that any person wishing to intervene should file an application to intervene no later than August 21. No applications to intervene were filed.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.¹ Since no one has asked permission to intervene, or requested a hearing, the Commission may grant the relief requested based on the application.

On September 6, 2001, the Staff of the Commission filed its Recommendation and Memorandum. Staff indicates that MGE's line replacement programs are referred to as its Safety Line Replacement Program, known by the acronym SLRP. MGE's past and current replacement programs for service and yard lines have resulted in the replacement of more than 230,000 service and yard lines. MGE's cast iron main replacement program resulted in the replacement of nearly 300 miles of cast iron mains, but the program ended in 2000. MGE's application includes a new long-term replacement program for cast iron mains, as required by 4 CSR 240-40.030(15)(D)2. In addition to cast iron main replacements, the application proposes a more comprehensive program that covers the repair of cast iron joint leaks and the replacement of copper service lines. The application also affects the inspection and replacement of protected bare steel mains and unprotected steel service and yard lines.

Staff indicates that it finds MGE's proposal to be generally acceptable. Staff does, however, recommend two modifications to MGE's proposal. The first modification is to delete the last sentence of subparagraph 11D on page 8 of the application. That sentence refers to efforts to eliminate Class 4 leaks over unprotected steel service and yard lines. Under Commission rule 4 CSR 240-40.030(14)(c)4, class 4 leaks are those that are confined or localized and are considered to be completely non-hazardous. The gas company is not required to take any further action regarding a class 4 leak. Staff indicates that the sentence in question incorrectly states that existing Class 4 leaks on unprotected steel service and yard lines will be re-classified to Class 3 and repaired within 5 years. Instead, all unprotected steel service and yard lines that have existing leaks, including all leaks that are currently classified as Class 4 leaks, will be replaced no later than June 30, 2003. MGE proposes this repair schedule in subparagraph 11B on page 7 of the Application. For new leaks discovered on unprotected steel service and yard lines, MGE will no longer use the Class 4 leak classification. Such leaks will be classified as Class 3 or higher, meaning that they will have an established repair deadline.

The second modification proposed by Staff refers to an item that was inadvertently left out of the Status Report list in paragraph 14 on page 9 of the application. The item should have followed item J and should have stated "Number of cast iron main leaks cleared by pipe diameter." Staff states that the two modifications are agreeable to MGE, and on September 7, MGE filed a response indicating its agreement to the modifications.

¹ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

Staff recommends that the Commission approve the application with the two modifications previously indicated. Staff also recommends that the Commission approve a modification of the waiver granted in Case No. GO-99-302, as requested in the application. Staff recommends that a copy of this order, or a notice to the case, or both, then be filed in Case No. GO-99-302 to reflect the change. Finally, Staff recommends that the Commission approve MGE's request that the Safety Line Replacement Program costs to be incurred as a result of the approved program be allowed deferral treatment pursuant to the Safety Line Replacement Program Accounting Authority Order granted by the Commission in Case No. GR-2001-292.

The Commission has considered the application filed by MGE, along with the Recommendation and Memorandum filed by Staff. The Commission concludes that MGE's proposed changes to its existing Safety Line Replacement Program will enhance the safety of its gas distribution system. The application should be approved.

IT IS THEREFORE ORDERED:

1. That the application filed by Missouri Gas Energy, a division of Southern Union Company, on July 30, 2001 is approved with the following modifications:
 - a. The last sentence of subparagraph 11D on page 8 of the application is deleted; and
 - b. The following item is added to the list of information, found in paragraph 14 on page 9 and 10 of the application: "Number of cast iron main leaks cleared by pipe diameter."
2. That the waiver granted in Case No. GO-99-302 is modified as requested by Missouri Gas Energy in paragraph 11 of its application filed on July 30, 2001.
3. That a copy of this order shall be filed in Case No. GO-99-302.
4. That the costs associated with replacements and rehabilitations called for under the provisions of paragraphs 10, 11, and 12 of the application filed by Missouri Gas Energy on July 30, 2001, are eligible for deferral under any Accounting Authority Order granted by the Commission to Missouri Gas Energy, including the Accounting Authority Order granted by the Commission in Case No. GR-2001-292.
5. That the deferral approved in paragraph 4 of this order shall not be construed as requiring the Commission to grant an Accounting Authority Order with regard to Missouri Gas Energy's Safety Line Replacement Program in the future. Nor shall it be construed as requiring the Commission to permit subsequent rate recovery of Safety Line Replacement Program costs deferred through issuance of an Accounting Authority Order.
6. That this order shall become effective on September 30, 2001.

Simmons, Ch., Murray and Lumpe, CC., concur Gaw, C., dissents

Woodruff, Senior Regulatory Law Judge

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**In the Matter of the Application of Ozark Shores Water Company
for an Order Canceling the Certificate of Public Convenience
and Necessity Issued to it in Case Number WA-99-99
for Water and Sewer Service at a Condominium Complex
Known as Summerhaven Condominiums.**

*Case No. WD-2001-701
Decided September 20, 2001*

Certificates §§45, 47. The Commission granted the company's application to cancel its certificate of public convenience and necessity.

Sewer §2. The Commission granted Ozark Shores Water Company's application to cancel the certificate of public convenience and necessity for water and sewer service and the sewer service tariff of Summerhaven Condominiums. Due to the mutual termination of an asset sale agreement, Ozark Shores Water did not acquire the properties involving the water and sewer systems as previously anticipated, and has no right to own, operate, manage or control those systems.

Water §2. The Commission granted Ozark Shores Water Company's application to cancel the certificate of public convenience and necessity for water and sewer service and the sewer service tariff of Summerhaven Condominiums. Due to the mutual termination of an asset sale agreement, Ozark Shores Water did not acquire the properties involving the water and sewer systems as previously anticipated, and has no right to own, operate, manage or control those systems.

**ORDER CANCELING CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY AND CANCELING TARIFF**

This order cancels the certificate of public convenience and necessity and the sewer service tariff of Summerhaven Condominiums.

On June 20, 2001, Ozark Shores Water Company (Ozark Shores or Company) filed an Application to Cancel Certificate of Public Convenience and Necessity and Water and Sewer Service Tariff for Summerhaven Condominiums. Ozark Shores was granted certificates of public convenience and necessity in Case Nos. WM-93-24 and WA-99-99. Ozark Shores states that this application concerns only one of the areas in which Ozark Shores holds a certificate of convenience and necessity, namely Summerhaven Condominiums.¹ Ozark Shores requests that the Commission cancel the certificate of convenience and necessity and the tariffs for service which authorized Ozark Shores to provide service to Summerhaven Condominiums because, due to the mutual termination of an asset sale agreement, Ozark Shores has never acquired the properties involving the water and

¹ Thus, only the certificate of convenience and necessity granted in WA-99-99 is affected by Ozark Shore's current application.

sewer systems as previously anticipated, and presently has no right to own, operate, manage or control those systems.

Background:

On September 9, 1998, Ozark Shores filed an application, in Case No. WA-99-99, in which it sought a certificate of convenience and necessity for two separate and unrelated areas. One of the areas was Summerhaven Condominiums. Ozark Shores and the owner of the water and sewer system at Summerhaven executed an "Amended Asset Purchase Agreement" in October 1999. In reliance upon that agreement, Ozark Shores entered into a unanimous stipulation and agreement on November 2, 1999, which recommended that the Commission grant a certificate of convenience and necessity to Ozark Shores. The stipulation and agreement was approved by the Commission by order issued November 16, 1999. Ozark Shores later submitted tariff sheets specifically for Summerhaven Condominiums, which the Commission approved by order issued August 4, 2000.

Ozark Shores has continued, through part of 2001, to operate the Summerhaven water and sewer system on a month-to-month basis for the owner, apparently pending a closing on the October 1999 "Amended Asset Purchase Agreement." During early 2001, a dispute arose between Ozark Shores and the owner. As a result of the dispute, there has been no closing and Ozark Shores has never acquired any ownership interests in any of the Summerhaven properties.

Efforts to resolve the dispute resulted in a Settlement Agreement and Release, under which Ozark Shores no longer has (a) any obligation or right to purchase the water and sewer properties at Summerhaven, (b) any obligation or right to operate or maintain the water and sewer properties at Summerhaven, or (c) the right to go upon the premises at Summerhaven without specific permission. Consequently, Ozark Shores states that it is no longer feasible or reasonable for it to maintain a certificate of convenience and necessity for Summerhaven.

Request for Cancellation:

As noted above, Ozark filed an application requesting that the Commission cancel its certificate of public convenience and necessity and its water and sewer tariff. On August 1, 2001, the Commission issued an Order and Notice, directing interested persons wishing to request a hearing or intervene in this matter to do so by August 13, 2001. The Staff of the Missouri Public Service Commission was directed to file a memorandum advising either approval or rejection of the application no later than August 14, 2001.

On August 14, 2001, Staff filed a Request for Enlargement of Time in Which to File Response. Staff stated that due to the complexity of the facts surrounding the application, Staff needed additional time to make and draft its determination regarding the application. Staff stated that counsel for Ozark Shores had no objection to the request for enlargement of time. The Commission granted Staff's request on August 17, 2001, extending the deadline for Staff to file its recommendation to August 22, 2001.

On August 22, 2001, Staff filed its recommendation in which it suggests that the Commission issue an order that (1) cancels the Company's certificate of public convenience and necessity for the provision of water and sewer service in the service area known as Summerhaven Condominiums, (2) cancels the Company's

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tariff provisions pertaining to its provision of water and sewer service to the Summerhaven Condominiums and authorizes the Company to file replacement tariff sheets reflecting the cancellation of those tariff provisions, and (3) makes no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the cancellation of the subject certificate in any later proceeding involving the Company.

Staff notes that while the Commission's authority to cancel a water and sewer certificate and tariff is not specifically set out in Chapter 393 of the Missouri Revised Statutes, the Commission has previously allowed companies to discontinue the operation of water and sewer services in various cases.

Staff states that based on its review of the Company's application, and of the Settlement Agreement and Release attached to the application, it is clear to Staff that the Company does not now have, nor will it likely ever have, any ownership interest in the water and sewer facilities used to provide service to the Summerhaven Condominiums service area. Likewise, under the terms of the Settlement Agreement, the Company does not now have any right or obligation to operate or maintain the subject water and sewer properties, or any rights to enter the premises without specific permission. In addition, the Company has not been providing service to this area under its approved tariff provisions, but instead has continued to operate the Summerhaven water and sewer system on a month-to-month basis for the owner, pending a closing on the October 1999 Amended Asset Purchase Agreement.

Staff indicates that it recommends approval of the application based on its assumption that service to the Summerhaven Condominiums area will revert back to the situation that existed prior to the Company's involvement; that is, that the owner of the water and sewer facilities will continue to provide service to the condominium development using those facilities. Staff notes that while this could result in the recurrence of the dispute between the owner and Staff regarding the owner becoming a Commission-regulated water and sewer provider, Staff does not believe that situation should affect the timing of the resolution of the Company's application. Furthermore, based on a conversation with a representative of the owner of the water and sewer facilities, Staff has learned that an agreement regarding the transfer of those facilities from the owner to the property owners' association is close to being finalized and that the owner will continue to provide service to the development pending the closing of that agreement. Staff states that assuming that the agreement is finalized, there will be no disputes regarding service or ownership of the facilities. However, Staff will continue to monitor the situation and will be prepared to take any necessary actions if that agreement is not finalized.

The Commission has reviewed the application and the official case file and finds that the Company's application for cancellation of its certificate of public convenience and necessity for the provision of water and sewer service in the service area known as Summerhaven Condominiums should be granted. The Commission also determines that the Company's tariff provisions pertaining to provision of water and sewer service to the Summerhaven Condominiums should be canceled, and that the Company shall be directed to file replacement tariff sheets

reflecting the cancellation of those tariff provisions. The Commission emphasizes that is not making any finding which would preclude it from considering, in any later proceeding, the ratemaking treatment to be afforded any matters pertaining to the cancellation of the Company's certificate.

IT IS THEREFORE ORDERED:

1. That the certificate of public convenience and necessity for the provision of water and sewer service in the service area known as Summerhaven Condominiums, granted to Ozark Shores Water Company in Case No. WA-99-99, is canceled
2. That the portion of the approved tariff of Ozark Shores Water Company which provides for Ozark Shores to provide water and sewer service for Summerhaven Condominiums is canceled, and that Ozark Shores Water Company is directed to file replacement tariff sheets reflecting the cancellation of those tariff provisions no later than October 1, 2001.
3. That the Commission makes no findings which would preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the cancellation of the subject certificate in any later proceeding involving Ozark Shores Water Company.
4. That this order shall become effective on September 30, 2001.

Simmons, Ch., Murray, Lumpe, and Gaw, CC., concur.

Ruth, Senior Regulatory Law Judge

In the Matter of the Petition of the North American Numbering Plan Administrator, On Behalf of the Missouri Telecommunications Industry, for Approval of NPA Relief Plan for the 314 and 816 Area Codes.*

*Case No. TO-2000-374
Decided September 25, 2001*

Telecommunications §§8, 26, 7. The Commission delays overlay relief for the 314 and 816 area codes until exhaustion of numbering resources is imminent.

ORDER DIRECTING STATE NUMBER POOLING TRIALS

Summary:

This order directs the implementation of 1,000s block number pooling in the state of Missouri.

*See pages 82, 237, 503 and 549 for other orders in this case.

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State Number Pooling Trials in the 314 and 816 NPAs:

On August 24, 2001, Staff moved the Commission to implement 1,000s block number pooling in the 314 NPA effective January 2, 2002, and in the 816 NPA effective February 1, 2002. Staff's motion suggests that the implementation time frame for national number pooling continues to be uncertain. State number pooling trials may be an effective bridge to preserve numbering resources and delaying the exhaust of NXX codes in the 314 and 816 NPAs and further postpone the burden of implementing the overlay relief plans previously approved by the Commission in this case.¹

Staff proposes eight requirements for the Commission for implementing state number pooling trials. These requirements define the code holders subject to number pooling, present an implementation structure and ensure compliance with appropriate guidelines. Staff's proposal defers immediate action to adopt a state cost recovery plan by suggesting that the Commission direct the industry to propose a cost recovery plan.

Public Counsel expressed support of state number pooling trials in a motion filed on July 23, 2001, and "fully concurred" in Staff's recommendation in its Suggestions in Support filed on August 31, 2001.

Southwestern Bell Telephone Company (Bell) and Sprint Missouri, Inc. d/b/a Sprint (Sprint) filed responses opposing Staff's request for number pooling trials on September 4 and 5, respectively. Bell asserted that with current code usage rates in the 314 and 816 NPAs that the national rollout of number pooling would occur in time to conserve numbering resources in these NPAs prior to exhaust. Bell argued that a state specific cost recovery plan under a state trial would unduly burden Missouri consumers and suggested that new cost saving software would be available for the national rollout of number pooling. Sprint concurred in Bell's position.

On September 14, 2001, Staff filed a reply to the responses from Bell and Sprint and provided additional information about the costs of implementing a state number pooling trial in Missouri. Staff's reply shows that the costs to the industry for contracting the services of the national pooling administrator, NeuStar, to administer pooling trials in Missouri would be de minimus.

Staff asserts on the basis of information obtained from NueStar that cost recovery by the industry will be on a regional basis, including the costs of converting software for the national pooling program and that Missouri will bear its share of these costs even if Missouri does not implement a pooling trial. Staff further states that many presumed costs associated with pooling are presently being recovered through local number portability recovery mechanisms.

Finally, Staff asserts that state pooling trials will not unnecessarily burden the Commission, Staff or the industry because the state pooling program will mirror the national pooling program. Staff says that state pooling trials implemented prior to March 2002 will be converted to national pooling immediately prior to the national roll-out.

¹ Based upon data from state pooling trials, 1,000s block number pooling can reduce demand for NXX codes by more than 50%. *NANPA Numbering News*, May/June 2001.

Staff presented information showing that the FCC rollout of national pooling continues to lag initial projections. This presents a possibility in that the 314 NPA or the 816 NPA could exhaust prior to implementation of number pooling on a national basis.

On September 21, 2001, GTE Midwest Incorporated, d/b/a Verizon Midwest (Verizon) filed a reply to Staff's September 14 reply. Verizon stated that certain software costs and costs of identifying number blocks in a state trial would not be recoverable in the national rollout. Verizon offered suggestions for a state cost recovery plan. Verizon stated that it could accept the deployment dates for a state pooling trial but questioned whether the costs would be justified in light of the imminent national rollout of 1,000s block numbering.

On September 24, 2001, Bell and Sprint filed a joint response to Staff's September 14 reply. These parties assert that because exhaust dates for the 314 and 816 NPAs are no longer imminent that ample time exists for the national rollout to occur such that the costs of a state pooling trial would be unnecessary and unwarranted.² Sprint and Bell argue that the 314 NPA is a prime candidate for early placement in the national rollout and that even under a worst case scenario where this NPA was the last selected in the region that national number pooling would occur in 2003 a year before the projected exhaust date. Sprint and Bell assert that carriers presently are preserving the integrity of 1,000s blocks assigned to them so that these blocks will be available for the national rollout.

Sprint and Bell also assert that there would be significant industry costs for a state trial. However, they do not quantify the costs. They also note that they face pooling trials and demands of meeting the national rollout in other states.

The Commission finds that state pooling trials as recommended by Staff can be implemented in Missouri with minimal costs to the industry and that few, if any, of these costs will be duplicated in a national rollout of number pooling. Whether or not Missouri implements number pooling trials, the industry and consumers will still bear costs on a regional basis to implement national number pooling. By implementing state pooling trials, Missouri can extend the lives of the 314 NPA and 816 NPA and delay considerable expenses and burdens to both consumers and the industry of implementing the overlay relief plans.

IT IS THEREFORE ORDERED:

1. That Staff's motion to implement state 1,000s block number pooling trials in the 314 and 816 NPA's is granted. The following conditions shall apply:

- A) All Local Number Portability (LNP) capable code holders in the 314 NPA shall participate in a mandatory 1000s block pooling trial.
- B) All LNP capable code holders in the 816 NPA shall participate in a mandatory 1000s block pooling trial.
- C) The industry, as represented by the North American Portability Management, LLC, shall contract with NeuStar for pooling administration services for the two pooling trials.

² Exhaust dates for both the 314 and 816 NPA are presently projected as 1Q2004 by NeuStar.

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- D) All code holders in the 314 and 816 NPA shall attend or make arrangements to be represented or participate in an implementation meeting to be held by NeuStar, as the Pooling Administrator, no later than October 5, 2001.
 - E) 1,000s block number pooling in the 314 NPA shall be implemented according to the timelines developed at the implementation meeting with a mandated start day of January 2, 2002.
 - F) 1,000s block number pooling in the 816 NPA shall be implemented according to the timelines developed at the implementation meeting with a mandated start day of February 1, 2002.
 - G) Pooling in the 314 and 816 NPAs will be conducted according to the Industry Numbering Committee's 1000s block pooling guidelines, as adopted and hereafter modified by the FCC.
 - H) The industry shall file a proposal identifying and allocating the costs and savings of the industry resulting from the pooling trials and provide a plan to fairly recover the net costs to the industry of the pooling trials, including any plan to recover the costs in existing charges.
 - I) The Staff shall file periodic reports advising the Commission of the status of the 1,000s block number pooling trials, when the trials are fully implemented and when the trials are ended and moved into to the national number pooling program.
2. That this order shall become effective on October 5, 2001.

Simmons, Ch., Lumpe and Gaw, CC., concur Murray, C., dissents

Thornburg, Regulatory Law Judge

In the Matter of the Petition of the North American Numbering Plan Administrator, On Behalf of the Missouri Telecommunications Industry, for Approval of NPA Relief Plan for the 314 and 816 Area Codes.*

*Case No. TO-2000-374
Decided September 25, 2001*

Telecommunications §§8, 26, 7. The Commission approves state number pooling trials for the 314 and 816 area codes.

*See pages 82, 237, 500 and 549 for other orders in this case. In addition, see page 319, Volume 7 MPSC 3d for an order involving the 314 area code issue (TO-98-212).

**ORDER DELAYING IMPLEMENTATION
OF THE 314 NPA AND 816 NPA OVERLAY RELIEF PLANS AND
DISMISSING A PARTY**

Summary:

This order delays indefinitely the implementation of the 314 NPA and 816 NPA relief plans. One party's request to be dismissed is granted.

Status of Case:

On October 24, 2000, the Commission issued its Report and Order (R&O) adopting an all services distributed overlay as the method of relief for the 314 and 816 Numbering Plan Areas (NPAs). The R&O established technical and planning committees for each NPA to develop relief implementation plans and schedules. The R&O required a consensus plan and schedule to be filed and allowed for responses to the proposed plans and schedules. Plans and responses were filed. After considering these matters, the Commission approved implementation plans for the 314 NPA on December 26, 2000, and for the 816 NPA on February 15, 2001.

On April 17, 2001, the Commission issued an Order Extending the 314 NPA and 816 NPA Relief Plan Implementation Dates. That order directed the Commission's Staff to report no later than August 31, 2001, and provide information regarding whether the implementation of NPA relief plans could be further postponed. The order allowed for all other parties to file similar reports or motions and also provided for responses to be filed no later than September 7, 2001.

The parties, individually and collectively through technical and education committees, have filed various reports, motions and responses regarding the status of NXX code usage and NPA relief in Missouri, number conservation efforts – particularly 1,000s block numbering, and the status of 1,000s block numbering at the national level.

Some parties requested additional time to file their responses and have so filed without objection. Requests to modify customer education plans and report dates have also been filed. Finally, one party has requested to withdraw from this case.

Indefinite Delay of 314 and 816 NPA Overlay Relief Plans:

On August 31, 2001, Southwestern Bell Telephone Company (Bell) filed a report on behalf of the Technical Implementation Subcommittees for the 314 and 816 NPAs recommending an indefinite delay in both the 314 and 816 NPA relief plans. The Committee proposes to file a later report regarding relief implementation when additional information becomes available.

According to the report, as of July 2001, there are 151 NXX codes available in the 314 NPA with 6 codes having been assigned in the previous seven months. NeuStar had not, as of the date of the Committee's report, updated the projected exhaust date for the 314 NPA currently shown by NeuStar as the 2Q2002. The Committee disagrees with NeuStar's forecast and the Committee, Staff, Office of the Public Counsel (Public Counsel), Bell and Verizon Wireless all suggested NeuStar should revise the exhaust date.

According to the report, as of July 2001, there are 180 NXX codes available in the 816 NPA with 28 codes assigned in the previous seven months. NeuStar projects an exhaust date of 1Q2004 for the 816 NPA.

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The Public Counsel filed suggestions in support of the Technical Committee's recommendation. The Public Counsel urged the Commission to request a new exhaust projection for the 314 NPA to assure that the present projection does not prejudice the placement of the 314 NPA in the national rollout schedule for 1,000s block number pooling. In filing in support of the Committee's recommendation, the Public Counsel effectively abandoned a previous position advocating a trigger for implementing NPA relief based upon a set number of codes available for assignment.

Staff also filed a response to the Committee's report. The Staff described the "current slow rate" of NXX utilization and concurred in the Committee's recommendation to postpone implementation of the NPA relief overlay plans. Staff recommended that it should be directed to monitor the code utilization and relief requirements along with the other parties to this case and inform the Commission when circumstances warrant scheduling implementation of the relief overlay plans.

Verizon Wireless was the only party filing comments dissenting from the Committee's report. This company suggested that the Commission should not take any action to delay the 314 NPA overlay relief plan absent action by NeuStar formally updating the projected exhaust date for the 314 NPA. On September 21, 2001, Staff filed a report showing that NeuStar acted on September 19, 2001, and had revised the projected exhaust date for the 314 NPA from 2Q2002 to 1Q2004.

The Commission has previously approved relief implementation plans for the 314 NPA¹ and the 816 NPA.² The only matters that the Commission would need to address to implement the plans are technical issues not resolved by the technical implementation committees,³ modifications suggested by any party to customer education plans,⁴ and the scheduling of dates for permissive and mandatory dialing under the overlay relief plans.

Previously, the parties have proposed and the Commission has approved permissive dialing plans of about four months duration.⁵ Because the relief plans are approved and ready to implement and because the Commission and the parties have gained familiarity with the relief plans adopted in this proceeding, the Commission and the industry are poised to fully implement the NPA relief plans within a period of only four to six months.

The Commission finds that based upon the number of available NXX codes and current code utilization requirements that the NPA relief overlay implementation plans can be delayed indefinitely, with implementation to be taken up upon Staff's

¹ *Order Approving the 314 NPA Relief Implementation Plan as Modified and Directing Filing*, December 26, 2000.

² *Order Approving 816 NPA Relief Implementation Plan and Directing Filing*, February 15, 2001.

³ To this date no technical issues have been brought to the Commission.

⁴ Staff recommended on March 2, 2001, that the Commission order affected telecommunications companies to provide individual customer notice of the overlay relief plans as part of the customer education plans.

⁵ See prior Commission orders issued December 26, 2000, February 15, 2001, and April 17, 2001.

motion, the motion of the Technical Implementation Committees, or alternatively, the motion of any party presenting information showing that exhaust is imminent or is likely to occur within six months.

Technical issues may be brought to the Commission's attention pursuant to the procedures previously approved. The Commission also finds that customer education subcommittees for both the 314 and 816 NPAs shall file updated summaries for the respective customer education plans within 30 days of a Commission order directing implementation of the NPA overlay relief plans. Any party may move for modification of updated customer education plans after they are filed.

Motion to Withdraw:

On August 31, 2001, MPower Communications Central Corp. f/k/a Broadspan Communications, Inc. d/b/a Primary Network Communications, Inc., filed a notice withdrawing as a party. MPower shall be dismissed from this case.

All Responses and Motions Accepted and Disposed:

All responses and motions filed and late filed are accepted. All motions and requests for relief that are presently pending in this case regarding implementation of NPA relief plans are granted or denied in whole or in part and disposed consistent with this order. The Commission will address the question of implementing state 1,000s block number pooling trials in a separate order.

IT IS THEREFORE ORDERED:

1. That the permissive dialing and mandatory dialing dates for the 314 NPA (557 overlay) shall be indefinitely suspended.
2. That the permissive dialing and mandatory dialing dates for the 816 NPA (975 overlay) shall be indefinitely suspended.
3. That technical implementation issues regarding the overlay relief plans that cannot be resolved by the technical implementation subcommittees shall be brought to the Commission pursuant to the procedures established in this case.
4. That the Commission's Staff and the technical implementation subcommittees for the 314 and 816 NPAs shall monitor code usage and assignment rates and promptly move the Commission to order implementation of the overlay relief plans when exhaust is imminent or will occur within six months. Any party in this case may likewise move for the Commission's action.
5. That the education subcommittees for the 314 and 816 NPAs shall file updated summaries of the industry customer education plans within 30 days of any order by the Commission implementing an overlay relief plan.
6. That MPower Communications Central Corp. f/k/a Broadspan Communications, Inc. d/b/a Primary Network Communications, Inc., shall be dismissed from this case.
7. That all pending responses and motions filed and late filed shall be accepted and that all pending motions and requests for relief regarding implementation of NPA relief plans are granted or denied in whole or in part and fully disposed consistent with this order. The Commission will address the question of implementing state 1,000s block number pooling trials in a separate order.

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8. That this order shall become effective on October 5, 2001.

Simmons, Ch., Murray, Lumpe and Gaw, CC., concur

Thornburg, Regulatory Law Judge

In the Matter of the Joint Application of Missouri-American Water Company, St. Louis County Water Company d/b/a Missouri-American Water Company and Jefferson City Water Works Company d/b/a Missouri-American Water Company for Authority to Merge St. Louis County Water Company d/b/a Missouri-American Water Company and Jefferson City Water Works Company d/b/a Missouri-American Water Company with and into Missouri-American Water Company and, in Connection therewith Certain Other Related Transactions.

*Case No. WM-2001-309
Decided September 27, 2001*

Water §4. The Commission authorized the merger of St. Louis County Water Company d/b/a Missouri-American Water Company and Jefferson City Water Works Company d/b/a Missouri-American Water Company with and into Missouri-American Water Company, approved a stipulation and agreement, and ordered that the parties comply with the conditions set forth in that agreement.

ORDER APPROVING STIPULATION AND AGREEMENT

Syllabus: The Commission authorizes the merger of St. Louis County Water Company d/b/a Missouri-American Water Company and Jefferson City Water Works Company d/b/a Missouri-American Water Company with and into Missouri-American Water Company, approves a stipulation and agreement, and orders that the parties comply with the conditions set forth in that agreement.

On November 14, 2000, St. Louis County Water Company d/b/a Missouri-American Water Company (County Water) and Jefferson City Water Works Company d/b/a Missouri-American Water Company (Jefferson City Water) filed an application requesting approval to merge with and into Missouri-American Water Company (Missouri-American). On September 7, 2001, the parties to this case filed a Stipulation and Agreement. Although one party, the Missouri Energy Group, did not join in the Stipulation and Agreement, it did not request a hearing and the Commission will treat the stipulation as unanimous pursuant to 4 CSR 240-2.115.

The parties recommend that the Commission approve the merger, subject to certain conditions. The conditions fall into six categories: A) customer service; B) water quality; C) surveillance reporting; D) billing information; E) accounting and allocation information; and F) capital investment. The provisions are summarized as follows:

A. The agreement states that American Water Works (the parent of the applicants) is in the process of opening a new call center in Alton, Illinois, and provides that Missouri-American will notify the Staff and Public Counsel 30 days before each of Missouri-American's operating districts and customers are moved to the new call center. It also provides that Missouri-American will notify affected customers with an on-bill message for three months after the customer call center conversions, and will place an advertisement in a local newspaper in each district immediately prior to the conversion. It also provides that Missouri-American will track call center performance data and provide quarterly and yearly reports on the performance.

B. The agreement provides that Missouri-American will continue to soften water to maintain an agreed-upon range of water hardness levels for the identified districts that currently soften water. These agreed-upon levels are to be in effect for two years. In addition, Missouri-American will investigate the use of chloramines in all districts.

C. The agreement provides that Missouri-American will provide monthly surveillance reports on an ongoing basis.

D. The agreement provides that, in addition to the information Missouri-American and County Water provide pursuant to agreements reached in Case Nos. WR-2000-281 and WR-2000-844, Missouri-American will collect data for the Jefferson City Water properties. The agreement provides that specific data related to billing cycle meter read dates, customer rerouting information and significant billing adjustments for all rate classes will be provided to the Commission's Staff and the Office of the Public Counsel.

E. The agreement provides that the accounting for the merger transaction will reflect the appropriate recording of assets, liabilities, revenues and expenses. The agreement provides that Missouri-American will organize its accounting for certain items to allow tracking of revenues, expenses, and rate base by district. These items include asset and liability accounts, direct and indirect costs of each district, revenues, and operating statistics.

F. In the agreement, Missouri-American agrees that it will continue to make the capital investments needed to provide safe and adequate service to its customers at just and reasonable rates in each of its operating systems/districts. It also agrees to be bound by all Commission orders pertaining to the three pre-merger entities (unless the orders are stayed, reversed, or superceded). In addition, Missouri-American agrees that over the next three years it will make an annual presentation about capital investments to the Staff and Public Counsel, with notice to the Utility Workers Union of America Local 335.

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On September 14, the Staff filed its suggestions in support of the agreement. Staff states that there are enough safeguards in the agreement that the proposed merger is not detrimental to the public interest. Staff highlights certain of the conditions, and notes that it obtained substantially all of its compliance and tracking goals related to quality customer service standards.

Pursuant to Section 536.060, RSMo 2000, the Commission may accept a agreement as a resolution of the issues. The Commission has reviewed the agreement, finds it to be reasonable and in the public interest and will, therefore, approve it. The Commission also finds that, with the conditions in the agreement, the proposed merger transactions are not detrimental to the public interest, and the Commission will authorize the transactions.

IT IS THEREFORE ORDERED:

1. That the Stipulation and Agreement filed on September 7, 2001, is approved, and all parties shall comply with the conditions therein.
2. That St. Louis County Water Company d/b/a Missouri-American Water Company and Jefferson City Water Works Company d/b/a Missouri-American Water Company are authorized to merge with and into Missouri-American Water Company, with Missouri-American Water Company being the surviving corporation, and to otherwise accomplish the St. Louis County Water Company Merger and the Jefferson City Water Works Company Merger, in accordance with the St. Louis County Water Company Merger Agreement and the Jefferson City Water Works Company Merger Agreement attached to the Joint Application.
3. That Missouri-American Water Company, St. Louis County Water Company and Jefferson City Water Works Company are authorized to perform in accordance with the terms of the St. Louis County Water Company Merger Agreement and the Jefferson City Water Works Company Merger Agreement and to enter into, execute and perform in accordance with the terms of all other documents and to take any and all actions which may be reasonably necessary and incidental to the performance of the St. Louis County Water Company Merger Agreement and the Jefferson City Water Works Company Merger Agreement.
4. That Missouri-American Water Company is authorized to acquire and assume the stocks and bonds, other indebtedness and other obligations of St. Louis County Water Company and Jefferson City Water Works Company, all as more particularly described in and pursuant to the terms of the St. Louis County Water Company Merger Agreement and the Jefferson City Water Works Company Merger Agreement.
5. That Missouri-American Water Company, as the surviving corporation after the St. Louis County Water Company Merger and the Jefferson City Water Works Company Merger, is authorized to provide water service in the current service territories of St. Louis County Water Company and Jefferson City Water Works Company in accordance with the rules, regulations, rates and tariffs of St. Louis County Water Company and Jefferson City Water Works Company unless otherwise ordered by the Commission.
6. That St. Louis County Water Company and Jefferson City Water Works Company are authorized to terminate their respective responsibilities as public utilities in the state of Missouri as of the effective date of the St. Louis County Water Company Merger and the Jefferson City Water Works Company Merger.

- 7. That this order shall become effective on October 7, 2001.
- 8. That this case may be closed after October 8, 2001.

Murray, Lumpe and Gaw, CC., concur Simmons, Ch., absent

Mills, Deputy Chief Regulatory Law Judge

Editor’s Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

In the Matter of the Tariff Filing of Missouri Public Service (MPS), a Division of UtiliCorp United, Inc., to Implement a General Rate Increase for Retail Electric Service Provided to Customers in the Missouri Service Area of MPS.

Case No. ER-2001-672
Decided October 2, 2001

Electric § 9. The Commission rejected The Office of Public Counsel's argument that the Commission does not have jurisdiction to decide a tariff case that involves less than the entire company. Public Counsel argued that Chapter 393 and Commission Rules require a rate case to include the entire company, not just a division of it. But § 393.150 permits the Commission to hear *any* schedule stating a new rate or charge.

Electric § 19. The Commission rejected The Office of Public Counsel's argument that a company that files a tariff for less than the entire company has committed discrimination. The Commission finds that Section 393.130 prohibits only "undue" discrimination; a company may legally charge customers differently due to the costs involved in serving them.

Electric § 20. The Commission rejected The Office of Public Counsel's contention that the Commission could not set different rates for a utility's customers. The Commission has authority to approve of tariffs that affect only one division of the company, assuming such tariffs do not unduly discriminate against them.

Rates § 21. The Commission rejected The Office of Public Counsel's argument that a company that files a tariff for less than the entire company has committed discrimination. The Commission finds that Section 393.130 prohibits only "undue" discrimination; a company may legally charge customers differently due to the costs involved in serving them.

Evidence, Practice and Procedure § 26. The Commission ruled that UtiliCorp has the burden of putting on competent and substantial evidence to support its contention that the Commission should approve of tariffs that charge different rates according to divisions within the company.

**ORDER REGARDING MOTION TO REJECT TARIFF
AND MOTION TO DISMISS**

Syllabus:

In this order, the Commission denies Public Counsel's Motion to Reject Tariff and Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted. The Commission explains that a rate case can be initiated by the filing of less than all of a company's tariffs. The Commission further explains that it may treat the service areas of a company differently for ratemaking purposes in appropriate circumstances, particularly where, following a merger, the formerly independent companies are not yet fully integrated.

Procedural History:

On June 8, 2001, UtiliCorp United, Inc., submitted to the Commission proposed tariff sheets intended to implement a general rate increase for electric service provided to retail customers in the Missouri service area of its Missouri Public Service operating division.¹ UtiliCorp's other Missouri operating division, St. Joseph Light & Power, was not included in the rate increase request.² On June 21, the Commission suspended the proposed tariff sheets until May 6, 2002.

On June 15, 2001, the Office of the Public Counsel moved to reject the proposed tariff sheets as "unlawful and deficient" because they do not include both operating divisions of the regulated company, UtiliCorp United, Inc.³ UtiliCorp responded twice to Public Counsel's motion, first on June 25, 2001, and again on July 11, 2001.⁴ None of the other parties, including Staff, responded. On July 19, the Commission directed Staff to respond to Public Counsel's motion by July 27. On the same day, Public Counsel filed its Supplemental Suggestions in Support of its Motion to Reject Tariff, stating therein an alternative motion to dismiss for failure to state a claim upon which relief may be granted. Staff filed its response on July 27 as directed. On July 30, UtiliCorp responded to Public Counsel's Supplemental Suggestions and to its alternative motion to dismiss.

On August 3, the Commission advised the parties that it would hear oral argument for and against Public Counsel's motions on August 14. The oral argument was convened as scheduled and all parties appeared by counsel. The transcript was filed on August 28. Immediately following the oral argument, the Commission advised the parties that additional written arguments could be filed by August 24, with any replies to be filed by August 31. Accordingly, Public Counsel, UtiliCorp, Staff, and Jackson County filed additional suggestions on August 24 and

¹ Missouri Public Service is also referred to as MPS.

² St. Joseph Light & Power Company is also referred to as SJLP.

³ Missouri Public Service and St. Joseph Light & Power Company are fictitious names under which UtiliCorp operates in different regions of Missouri.

⁴ The purpose of UtiliCorp's supplemental response, filed on July 11, was to advise the Commission that it had determined to not pursue a rate increase in its St. Joseph operating division at this time, a possibility referred to in its original response of June 25.

Public Counsel, UtiliCorp, and Jackson County filed reply suggestions on August 31. Jackson County filed revised suggestions on August 27; Staff submitted a letter on August 31 rather than reply suggestions.

The Arguments of the Parties:

Public Counsel's Motion to Reject Tariff

Public Counsel asserts that UtiliCorp chose to purchase and merge with St. Joseph Light & Power Company and that it is now bound by the ratemaking consequences of that business decision. Public Counsel makes several arguments in support of its motion to reject tariff. First, Public Counsel contends that the various sections in Chapter 393, RSMo 2000,⁵ that authorize the Commission to set electric rates all refer to the "electrical corporation" and thus require that rates be set on a corporation-wide basis and not separately for operating divisions. Second, Public Counsel asserts that Commission Rules 4 CSR 240 2.065(1) and 4 CSR 240 2.070(2) "require that a general rate increase be made 'company-wide.'"⁶ Third, Public Counsel characterizes UtiliCorp's single-division general rate increase request as "unprecedented" and states that "no Chapter 393 utility . . . has ever been permitted by the Commission to initiate a general rate case by filing revised tariffs for only selective regions within their certificated electric service areas." Fourth, Public Counsel contends that proceeding with UtiliCorp's rate case would violate the "all relevant factors" requirement imposed by Section 393.270.4. This statute requires that the Commission consider all relevant factors in setting just and reasonable utility rates.⁷ Fifth, Public Counsel contends that rates based on a consideration of only one service area may result in a violation of Section 393.130.2, which forbids discrimination in utility rates. Finally, Public Counsel argues that it would be bad public policy, for several reasons, to permit UtiliCorp to initiate a general rate case for only one of its two operating divisions. The reasons cited are, first, that it would limit the Commission's rate-design options and, second, that it will encourage other utilities to follow suite in hopes of gaming the system to the advantage of investors by showing the Commission less than the whole financial picture of the regulated entity. To permit UtiliCorp to proceed in this manner would, Public Counsel warns, "open the floodgates."

UtiliCorp states that this is a legal question, "whether or not UtiliCorp has the lawful right to initiate a rate case for a distinct operating division." UtiliCorp responds to Public Counsel's first argument by suggesting that the sections in Chapter 393 cited by Public Counsel nowhere explicitly require that rates be set on a corporation-wide basis and not separately for operating divisions. UtiliCorp further asserts that Section 393.150 "makes it quite clear that a public utility is not

⁵ All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

⁶ Rule 4 CSR 240-2.070(2), which refers to informal complaints against utilities by consumers, was presumably cited in error.

⁷ It is the source of the prohibition on single-issue ratemaking. See *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

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required to put at issue all tariffs related to all of its operations if it only desires to propose a change for certain operations of one of its divisions” and that “the public utility may file, and the Commission may consider, something less than all of the tariff sheets and all of the rates and charges involving all of the service provided by a public utility.”

In response to Public Counsel’s second argument, UtiliCorp states that Commission Rules 4 CSR 240 2.065(1) and 4 CSR 240 10.070(2) do not “purport to establish requirements as to what tariffs must be put at issue in a general rate case filing.” It is noteworthy that UtiliCorp here cites the regulation that Public Counsel presumably intended to cite, but did not, Rule 4 CSR 240 10.070(2), *Minimum Filing Requirements for General Rate Increase Requests*, which states:

A general rate increase request is one where the company or utility files for an overall increase in revenues through a company-wide increase in rates for the utility service it provides, but shall not include requests for changes in rates made pursuant to an adjustment clause or other similar provisions contained in a utility’s tariffs.

UtiliCorp asserts that this rule merely provides a definition of the term “general rate increase.” UtiliCorp goes on to point out, by way of example, that companies providing two or more utility services, such as AmerenUE (electric and natural gas), have never been required to include all services simultaneously in a rate case. Furthermore, and in response to Public Counsel’s third argument, UtiliCorp states that this Commission has indeed conducted division-specific rate proceedings in the past.⁸ UtiliCorp points to the case of the former Missouri Water Company, which had two operating divisions, the Independence Division and the Lexington Division. On at least three occasions, according to UtiliCorp, this Commission conducted rate increase proceedings involving one of these divisions, but not both.⁹ Similarly, UtiliCorp states that the Commission permitted Missouri Cities Water Company to pursue a rate increase which did not include its Warrensburg district.¹⁰ UtiliCorp points out that Public Counsel’s attempt to distinguish these cases as “the non-interconnected operations of water companies” is not founded on any statutory distinction.

⁸ UtiliCorp does not state whether the objection raised here by Public Counsel was raised in any of these cases.

⁹ See *In the Matter of Missouri Water Company for Authority to File Tariffs Increasing Rates for Water Service Provided to Customers in the Independence Division of the Company*, 23 Mo. P.S.C. (N.S.) 451 (1980); *In the Matter of Missouri Water Company for Authority to File Revised Tariffs Reflecting Increased Rates for Water Service and New Rate J to Customers in the Independence Division of the Company*, 22 Mo. P.S.C. (N.S.) 77 (1978); and *In the Matter of Missouri Water Company for uthority to File Tariffs Reflecting Increased Rates for Water Service Provided to Customers in the Independence Division of the Company*, 18 Mo. P.S.C. (N.S.) 203 (1973).

¹⁰ See *In the Matter of Missouri Cities Water Company for Authority to File Tariffs Reflecting Increased Rates for Water Service*, 18 Mo. P.S.C. (N.S.) 421 (1974).

In response to Public Counsel's fourth argument, UtiliCorp contends that Public Counsel misunderstands the "all relevant factors" requirement as explained by the Missouri courts. The law requires the Commission to consider all *relevant* factors, UtiliCorp asserts, not *all* factors. UtiliCorp states that such independent operating division ratemaking as it has proposed here does not violate the prohibition against single-issue ratemaking because, within its Missouri Public Service division, all relevant factors will be considered, including any allocations to or from the St. Joseph operating division. In any event, UtiliCorp argues, whether or not the Commission has considered all relevant factors in setting rates is a factual question and is not jurisdictional.

UtiliCorp further points out that the Commission is authorized to examine any matter it chooses, including the operations of its SJLP division. UtiliCorp states, "Presumably the Staff, OPC and other parties will be able to address these matters through the discovery and evidentiary process in this case." UtiliCorp agrees with Public Counsel that the Commission is required to consider all relevant factors when setting rates and denies that it has requested anything less in this case. If this case is permitted to proceed, UtiliCorp expects that the Commission will develop a total Missouri jurisdictional revenue requirement for its electric service operations.

In response to Public Counsel's fifth argument, UtiliCorp states that Public Counsel appears to be taking the position that single-tariff pricing is required for all multi-district utility operations. UtiliCorp points out that the Commission recently rejected this point of view.¹¹ UtiliCorp further states that the different costs of serving different customers may permissibly be reflected by different rates; it is only "undue" discrimination that is unlawful.¹² UtiliCorp quotes the Missouri Supreme Court, "We are able to discern no legitimate reason or basis for the view that a utility must operate exclusively either under a system wide rate structure or a local unit rate structure"¹³

As to Public Counsel's sixth argument, UtiliCorp denies that it would be bad public policy to permit it to proceed with a rate increase proceeding applicable only to its Missouri Public Service division. UtiliCorp contends that all necessary information is available to the Commission in dealing with multiple-jurisdiction utility companies and that regulated entities are thus unable to manipulate financial information as charged by Public Counsel.

UtiliCorp also suggests that, in approving its merger with St. Joseph Light & Power Company, this Commission approved the independent operation of the two

¹¹ See *In the Matter of Missouri-American Water Company*, Case No. WR-2000-281 (Report & Order, iss'd Aug. 31, 2000), *relying on State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 933 (Mo. banc 1958).

¹² See *State ex rel. Capital City Water Co. v. Missouri Public Service Commission*, 850, S.W.2d 903, 911 (Mo. App., W.D. 1993); *In the Matter of Missouri Utilities Company*, 20 Mo. P.S.C. (N.S.) 294 (1975). UtiliCorp also cites federal decisions for this proposition.

¹³ *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 933 (Mo. banc 1958).

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divisions and that this independence necessarily extends to ratemaking.¹⁴ UtiliCorp bases this argument upon various statements in the Commission's December 14 *Report and Order*, to the effect that particular issues are best resolved in a general rate case encompassing the St. Joseph division.

In reply, Public Counsel argues that UtiliCorp's purpose in pursuing a rate case limited to only its MPS division is to "deny its ratepayers the 'merger synergies' that it touted as justification for its recently approved merger with St. Joseph Light & Power Company in Case No. EM-2000-292." Public Counsel notes that Section 386.020 distinguishes between electric corporations and gas corporations, thus permitting a utility engaged in both lines of business to seek rates for each operation separately. Public Counsel also seeks to distinguish the examples of ratemaking by divisions that UtiliCorp points to by noting that these were "the non-interconnected operations of water companies" and that these cases were decided before the Missouri Supreme Court issued its decision in *Utility Consumers Council* in 1979.¹⁵ Public Counsel further explains that, in each of those cases, the Commission first determined a total Missouri jurisdictional revenue requirement and then allocated it among the various divisions/service territories as an exercise in rate design.

Staff filed its response on July 27 as ordered. Staff supports UtiliCorp in this matter. Staff states that the "consequence of Public Counsel's proposed procedure is the relitigation in a refiled UtiliCorp rate case [of] large portions of the St. Joseph Light & Power Company—UtiliCorp United, Inc., merger case."

With respect to Public Counsel's first argument, that the statutes do not authorize ratemaking by divisions, Staff states that "Public Counsel cites no express statutory language [and no case law] that prohibits the Commission from proceeding with a general rate case on a division of operation basis when the divisions of operation are formerly separate and distinct electrical corporations that have not been fully integrated, as is the instant case, and have different costs of service and rate designs." Staff notes that the Commission, historically, has not required consolidated rate cases for utilities engaged in more than one line of utility business. With respect to Public Counsel's second argument, that the Commission's rules require a general rate case to proceed on a "company-wide" basis, Staff states that the phrases in certain Commission rules relied upon by Public Counsel are undefined and need not be construed as Public Counsel has construed them.

As to Public Counsel's third argument, that UtiliCorp's single-division rate request is "unprecedented," Staff points to the same examples as does UtiliCorp, in which water companies with multiple divisions sought rate increases in less than all of their service areas. Contrary to Public Counsel's position, Staff points

¹⁴ See *In the Matter of the Joint Application of UtiliCorp United, Inc., and St. Joseph Light & Power Company for Authority to Merge*, Case No. EM-2000-292 (*Report and Order*, issued December 14, 2000).

¹⁵ *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979). See *supra*, note 5. This case articulated the requirement that the Commission consider "all relevant factors" when setting rates.

out that at least one of these cases was decided *after* the Missouri Supreme Court issued its decision in *Utility Consumers Council*. Staff also identifies additional examples where, following a merger, the Commission set different rates for different parts of what was legally a single entity.¹⁶ Staff also notes that Union Electric Company has three different PGA schedules, each applicable to a region reflecting one of the three subsidiaries that merged into Union Electric in 1983.¹⁷

In response to Public Counsel's fourth argument, that ratemaking by division would violate the prohibition against single-issue ratemaking, Staff states that the Commission will consider "all relevant factors" as required by law if this case proceeds, including the specific concerns raised by Public Counsel. Staff points out that, although UtiliCorp has not filed new tariffs for its SJLP division, nor for its MPS division operations other than electric service, Staff will gather and analyze information regarding all aspects of UtiliCorp's Missouri jurisdictional operations. Staff further states that it will file excessive earnings complaints with respect to UtiliCorp's operations other than its MPS electric service operations if the information it collects warrants such an action.

In response to Public Counsel's fifth argument, Staff responds that Section 393.130.2 does not forbid different rates where the cost of service or other relevant conditions are in fact different. Staff points out that the Missouri Supreme Court has held that the Commission has discretion, in a merger case, to set separate rates for the customers of what were formerly two separate companies "[u]ntil the unification of the two systems are accomplished or the effect thereof is reasonably discernable[.]"¹⁸

Finally, in response to Public Counsel's argument concerning public policy, Staff suggests that full and complete discovery in this matter will meet Public Counsel's public policy concerns.

Intervenor Kansas City supports Public Counsel in this matter and asserts the same arguments and concerns. Intervenor Jackson County and the Sedalia Industrial Energy Users Association also support Public Counsel. These intervenors contend that only the Commission's Staff has the resources to pursue an overearnings complaint and that, in view of Staff's alignment with UtiliCorp, the degree of protection afforded by a potential complaint appears to be greatly reduced. Intervenor Jackson County also criticizes Staff's reliance on *McKittrick*.¹⁹ That case was a *merger* case, not a *rate* case like the present proceeding. Jackson County asserts, "Now, however, we are in a rate case and the effect of the unification of the two systems 'is accomplished or the effect thereof is reasonably discernible.'"

¹⁶ See *In the Matter of the Joint Application of the Companies Comprising the Union Electric System*, 26 Mo. P.S.C. (N.S.) 418 (1983); *In the Matter of Union Electric Company, Arkansas Power & Light Company and Sho-Me Power Corporation*, 1 Mo. P.S.C.3d 96 (1991).

¹⁷ Missouri Power & Light Company, Missouri Edison Company and Missouri Utilities Company. Each region is, however, also served by a different pipeline.

¹⁸ *State ex rel. McKittrick v. Public Service Commission*, 175 S.W.2d 857, 866 (Mo. banc 1943). It is noteworthy that this case contemplated the continuation of the separate rates indefinitely.

¹⁹ *Id.*

Public Counsel's Motion to Dismiss

In its Supplemental Suggestions, filed on July 19, Public Counsel asserts that “[t]o the extent that UtiliCorp is requesting increased rates for a mere selected portion of its service territory, and essentially asking the Commission to hypothetically assume that the merger did not take place, it is requesting relief that cannot lawfully be granted.” Public Counsel, in the alternative, moves the Commission to dismiss because UtiliCorp has failed to state a claim upon which relief can be granted.

UtiliCorp responds that it has done everything necessary to initiate a rate case under Section 393.150 in that it has filed a “schedule stating a new rate or charge.”²⁰ Therefore, UtiliCorp asserts, Public Counsel’s motion to dismiss should be denied.

At oral argument, Public Counsel conceded that “a rate case can be initiated by filing less than all of your tariffs.”²¹ Public Counsel went on to state, however, that regardless of what tariffs were filed or not filed to initiate a rate case, all of the company’s operations and all of its rates were thereby put at issue. In the same way, Public Counsel stated in response to Staff that all of the issues pertaining to the UtiliCorp-St. Joseph Light & Power merger are necessarily at issue in this rate case.

UtiliCorp, in turn, denies that its rates in its St. Joseph division are at issue in this case. UtiliCorp asserts that the Commission “can’t disturb those rates unless one of two things happened: they are either put at issue by the company or a complaint is brought, as a matter of law.”²² Instead, UtiliCorp suggests that, by not filing proposed tariffs for that division, the company has elected to take the risk that it will not recover its entire revenue requirement.²³ UtiliCorp states that, while it intends eventually to “bring the rates closer together,” it does not presently wish to impose any rate increase upon its SJLP division. In the present case, UtiliCorp contends, “the only customers who will be affected . . . will be the MPS electric customers, because those are the only rates that are at issue.” Thus, in the present case, UtiliCorp argues that, should the Commission determine that certain costs should be allocated to the SJLP division, the company will simply not recover those costs. UtiliCorp points out, as an example, that in its past electric rate cases, some costs might be assigned to its steam operation and those costs would not be recoverable.

Intervenor Jackson County agrees with UtiliCorp that the Commission “cannot do anything in this proceeding to change such rates [i.e., of SJLP] even if it is discovered during the investigation of all factors that such rates produce overearnings

²⁰ See *State ex rel. Jackson County v. Public Service Commission of Missouri*, 532 S.W.2d 20, 28 (Mo. banc 1975).

²¹ Tr. 2:59, at lines 6-8.

²² Tr. 2:103, at lines 21-25.

²³ Tr. 2:71.

to UtiliCorp.” The reason is that “[t]here has been no notice to the public as to such rates.” Jackson County asserts that, given the passage of three months, the Commission can only reject UtiliCorp’s tariffs and dismiss this proceeding, for sufficient time does not remain to cure the deficiency by giving notice to UtiliCorp’s St. Joseph ratepayers. The Staff, as well, has indicated that the present procedural schedule would not permit it to fully audit both UtiliCorp’s MPS and SJLP electric service operations.

Discussion:

UtiliCorp contends, in view of the Public Counsel’s two motions questioning the Commission’s jurisdiction to proceed, that the only question properly before the Commission is whether or not its initial filings were legally sufficient to initiate a rate case. The Commission concludes that they were sufficient. The law states that a rate case is initiated “[w]henver there shall be filed with the commission by any . . . electrical corporation . . . any schedule stating a new rate or charge[.]”²⁴ Thus, the filing of even a single proposed tariff is legally sufficient to initiate a general rate case under the “file and suspend” method.

Public Counsel argues that UtiliCorp’s initial filings are insufficient under the relevant Commission rules.²⁵ The only insufficiency cited by Public Counsel is that those rules both speak in terms of “a company-wide increase in rates” while the tariffs filed by UtiliCorp seek an increase only in its MPS service area. However, the Commission understands that phrase as merely a reformulation of the statutory proposition cited above, that the filing of even a single proposed tariff is sufficient to invoke the Commission’s ratemaking authority. Therefore, Public Counsel’s motion to reject tariff must be denied because the tariffs in question are sufficient under the relevant statutes and rules.

Public Counsel’s alternative motion to dismiss for failure to state a claim upon which relief may be granted, however, is a different matter. Because Public Counsel’s argument is that the Commission lacks authority to grant the relief sought by UtiliCorp, the Commission will treat Public Counsel’s motion as a motion to dismiss for lack of subject matter jurisdiction rather than as a motion to dismiss for failure to state a claim. “A motion to dismiss for failure to state a claim upon which relief can be granted attacks the legal sufficiency of the petition by claiming that, even if the facts in the pleading are true, the facts do not constitute legal grounds for any relief.”²⁶ The legal sufficiency of UtiliCorp’s initial filing has already been reviewed. A motion to dismiss for lack of subject matter jurisdiction, on the other hand, questions the authority of the tribunal to grant the requested relief.²⁷

Public Counsel argues that the Commission cannot conduct a rate case for less than all of the Missouri-jurisdictional electric service operations of UtiliCorp. Its primary arguments are that such an undertaking would violate both Section 393.130.2, which prohibits discrimination, and Section 393.270.4, which requires consideration of all relevant factors. The Commission concludes that neither of these statutes prohibits the present proceeding.

²⁴ Section 393.150.1, RSMo 2000.

²⁵ Rules 4 CSR 240-2.065(1) and 4 CSR 240-10.070.

²⁶ J.R. Devine, *Missouri Civil Pleading & Practice*, Section 20-3 (1986).

²⁷ See J.R. Devine, *supra*, Section 9-1.

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UtiliCorp and Staff have both cited ample cases to demonstrate that Section 393.130.2 only prohibits *undue* discrimination, that is, discrimination not based on facts demonstrating that the ratepayers in question are not in some respect similarly situated. “The purpose of the Public Service Commission Law, Sections 386 through 394, RSMo 1978, is to secure equality in service in rates for all who need or desire these services and who are similarly situated.”²⁸ Typically, differences in rates are based on facts demonstrating differences in cost of service.²⁹

As UtiliCorp points out, Section 393.270.4 requires that the Commission consider all *relevant* factors, not *all* factors. UtiliCorp and the Staff have cited ample examples of cases in which the Commission has set rates on a basis that is less than the total Missouri jurisdictional operations of a company with respect to a given line of service. The Commission is equipped with broad discretion in ratemaking and “it is not methodology or theory but the impact of the rate order which counts in determining whether rates are just, reasonable, lawful, and non discriminating.”³⁰

Staff has cited a case in which the Missouri Supreme Court approved the Commission’s authority to engage in ratemaking on a separate service area basis where one utility had purchased another and the two were not yet integrated.³¹ The Court stated, “Until the unification of the two systems is accomplished or the effect thereof is reasonably discernible, we think and hold the Commission in its reasonable discretion is justified in treating the two systems as separate units for rate purposes, notwithstanding the ownership and control of both have come into the same hands.”³² Intervenor Jackson County is too quick to maintain that this holding in a merger case has no relevance in this rate case. It is noteworthy, in this regard, that the *McKittrick* case contemplated separate treatment for an indefinite period.³³

In the present case, two formerly independent utilities have become one upon the purchase of one by the other and their consequent merger. The two had separate and distinct, contiguous electric service areas with separate and distinct transmission and distribution systems and generating assets. They are evidently linked today by a single transmission line. While a joint dispatch agreement exists, it has evidently not yet been fully implemented. The books of the two companies were necessarily maintained separately in the past and are still, even after the merger. Testimony has been filed to the effect that it will take at least a year to fully

²⁸ *Reinhold v. Fee Fee Trunk Sewer, Inc.*, 664 S.W.2d 599, 604 (Mo. App., E.D. 1984), cert. den., 469 U.S. 832, 105 S.Ct. 121, 83 L.Ed.2d 63.

²⁹ See e.g. *State ex rel. Dyer v. Public Service Commission*, 341 S.W.2d 795, 799 (Mo. 1961).

³⁰ *State ex rel. Associated Natural Gas Co. v. Public Service Commission of Missouri*, 706 S.W.2d 870, 879 (Mo. App., W.D. 1985).

³¹ *State ex rel. McKittrick v. Missouri Public Service Commission*, *supra*, at footnote 18.

³² *Id.* at 866.

³³ *Id.*, at 858-859.

integrate the two.³⁴ Under these circumstances, and purely as an interim measure, the Commission may treat the service areas of the formerly independent companies separately for ratemaking purposes.

As a final note, UtiliCorp has the burden of adducing sufficient competent and substantial evidence to support the Commission’s preliminary conclusion that the degree of integration of MPS and SJLP is such that the Commission may treat the formerly independent service areas separately for ratemaking purposes. That evidence must be adduced at hearing and be subject to cross-examination.

IT IS THEREFORE ORDERED:

1. That Public Counsel’s Motion to Reject Tariff, filed June 15, 2001, is denied.
2. That Public Counsel’s Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted, filed July 27, 2001, is denied.
3. That this order will become effective on October 12, 2001.

Simmons, Ch., Murray, and Lumpe, CC., concur. Gaw, C., absent.

Thompson, Deputy Chief Regulatory Law Judge

In the Matter of the Joint Application of Gateway Pipeline Company, Inc., Missouri Gas Company and Missouri Pipeline Company and the Acquisition by Gateway Pipeline Company of the Outstanding Shares of UtiliCorp Pipeline Systems, Inc.

*Case No. GM-2001-585
Decided October 9, 2001*

Evidence, Practice and Procedure §4. Under the pleading presenting the stock purchase agreement effectively accomplishing a sale of assets for the Commission’s approval, the applicants assert that the transaction presented will not be detrimental to the public. Therefore, they have the burden of proving that assertion. *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. banc 1991); *see also Dycus v. Cross*, 869 S.W.2d 745 (Mo. banc 1994).

While applicants must prove that the transaction is not detrimental to the public, other parties have asserted that the merger is detrimental in one or more specific areas. The burden of proof is never shifted; however, the burden of going forward with evidence may shift if a prima facie case is made. *Anchor Centre Partners* at 30. Therefore, the parties asserting that the transaction is detrimental to the public in a particular way have the burden of going forward by presenting sufficient evidence to support their particular assertions.

³⁴ Direct Testimony of Gary L. Clemens, p. 3.

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Gas §6. The Commission placed various conditions related to safety, operations, regulatory jurisdiction and financial reporting with approval of a sale of assets through a stock purchase agreement.

Gas §6. Pursuant to Commission Rule 4 CSR 240 2.060(7) and/or (12), the applicants must show why the proposed transaction is not detrimental to the public interest. The right to sell property is an important incident of the ownership thereof and “[a] property owner should be allowed to sell his property unless it would be detrimental to the public.” *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). “The obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility.” *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). To that end, the Commission has previously considered such factors as the applicant’s experience in the utility industry; the applicant’s history of service difficulties; the applicant’s general financial health and ability to absorb the proposed transaction; and the applicant’s ability to operate the asset safely and efficiently. See, *In the Matter of the Joint Application of Missouri Gas Energy et al.*, Case No. GM-94-252 (*Report and Order*, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220.

Gas §6. Under Section 393.190(1) no gas corporation may sell or otherwise dispose of any part of its works or system nor by any means, direct or indirect, merge or consolidate such works or system with any other corporation without first obtaining the order of the Commission authorizing it to do so. In this case Seller, a regulated public utility, is selling its wholly owned affiliate that in turn owns two Missouri regulated public utility companies that each own a state regulated intrastate gas transmission pipeline. Seller is effectively selling part of its system by selling its wholly owned subsidiaries.

Gas §7. The Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the Statutes and powers reasonably incidental thereto. *State ex rel. and to Use of Kansas City Power & Light Company v. Buzard*, 168 S.W.2d 1044, (Mo. Banc 1943).

Gas §7. Under Section 386.250(1) and (5), RSMo, the Commission has jurisdiction extending to the distribution of natural gas within the state and to all public utility corporations subject to the Public Service Commission law.

Gas §7. Seller in the agreement presented for the Commission’s approval is both a gas and an electrical corporation under Section 386.020, RSMo. Thus, seller is a public utility and is subject to the jurisdiction of the Commission.

Gas §7. Under Section 393.190(1), RSMo, no gas corporation may sell or otherwise dispose of any part of its works or system nor by any means, direct or indirect, merge or consolidate such works or system with any other corporation without first obtaining the order of the Commission authorizing it to do so.

Gas §7. Seller is a regulated public utility, selling its wholly owned affiliate that in turn owns two Missouri regulated public utility companies that each own a state regulated intrastate gas transmission pipeline. Seller is effectively selling part of its system by selling its wholly owned subsidiaries.

Gas §7. In this case the Seller is a regulated public utility corporation. The subsidiaries are also regulated public utilities and are wholly owned and controlled by Seller through a wholly owned affiliate. The transaction presents the sale of part of Seller’s system and therefore the Commission has jurisdiction and a duty to review the transaction and determine whether it may be approved.

Gas §16. The Commission specifically ordered compliance with safety requirements as a condition for approval of sale of intrastate gas pipeline companies.

APPEARANCES

Paul A. Boudreau and James C. Swearengen, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102-0456, for UtiliCorp United Inc., Missouri Pipeline Company Missouri, Inc. and Missouri Gas Company.

Mark W. Comley, Newman, Comley & Ruth P.C., 601 Monroe Street, Suite 301, Jefferson City, Missouri 65101
and

Michael C. Pendergast and Joseph T. Clennon, 720 Olive Street, St. Louis, Missouri 63101, for Laclede Gas Company.

Mary Ann (Garr) Young, William D. Steinmeier, P.C., P.O. Box 104595, Jefferson City, Missouri 65110-4595, for CMS Panhandle Eastern Pipeline Company.

Jeffrey A. Keevil, Stewart & Keevil, L.L.C., 1001 Cherry Street, Columbia, Missouri 65201, for Gateway Pipeline Company.

Ronald K. Evans, Managing Associate General Counsel, One Ameren Plaza, 1901 Chouteau Avenue, St. Louis, Missouri 63166-6149, for Union Electric Company d/b/a AmerenUE.

M. Ruth O'Neill, Legal Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for Office of the Public Counsel and the Public.

Lera L. Shemwell, Associate General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Keith A. Thornburg

REPORT AND ORDER

Syllabus

This Report and Order grants an application authorizing Gateway Pipeline Company, Inc. (Gateway) to buy all the shares of UtiliCorp Pipeline Systems (UPL) under a Stock Purchase Agreement with UtiliCorp United Inc. (UtiliCorp). The Commission determines that, subject to the conditions imposed herein, the transaction is not detrimental to the public interest.

As a result of this transaction, Gateway will acquire control and indirect ownership of Missouri Pipeline Company (MPC) and Missouri Gas Company (MGC). MGC and MPC are subsidiaries of UPL and indirect subsidiaries of UtiliCorp. MGC and MPC are Missouri regulated public utilities that own separate but connected intrastate natural gas transmission pipelines crossing east, east central, and south central Missouri. Gateway will also acquire control of an inactive interstate pipeline extending from Missouri under the Mississippi River into Illinois, referred to as the Trans Mississippi Pipeline (TMP).

Jurisdiction

The Commission's jurisdiction was contested in this matter. On May 24, 2001, the Commission issued its order determining that it has jurisdiction in a 3-1 decision and joined UtiliCorp as a necessary party. The Commission summarizes the basis for its jurisdiction here.

The Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the Statutes and powers reasonably incidental thereto. *State ex rel. and to Use of Kansas City Power & Light Company v. Buzard*, 168 S.W.2d 1044, (Mo. Banc 1943). Under Section 386.250(1) and (5), the Commission has jurisdiction extending to the distribution of natural gas within the state and to all public utility corporations subject to the Public Service Commission law. UtiliCorp is the seller in the agreement presented for the Commission's approval. UtiliCorp is both a gas and an electrical corporation under Section 386.020. UtiliCorp is a public utility and is subject to the jurisdiction of the Commission.

Under Section 393.190(1) no gas corporation may sell or otherwise dispose of any part of its works or system nor by any means, direct or indirect, merge or consolidate such works or system with any other corporation without first obtaining the order of the Commission authorizing it to do so. In this case UtiliCorp, a regulated public utility, is selling its wholly owned affiliate that in turn owns two Missouri regulated public utility companies, MPC and MGC, that each own a state regulated intrastate gas transmission pipeline. UtiliCorp is effectively selling part of its system by selling its wholly owned subsidiaries.

In this case the seller, UtiliCorp, is a regulated public utility corporation. The subsidiaries, MGC and MPC, are also regulated public utilities and are wholly owned and controlled by UtiliCorp through UPL. The transaction presents the sale of part of UtiliCorp's system and therefore the Commission has jurisdiction and a duty to review the transaction and determine whether it may be approved.

Standard of Review

Pursuant to Commission Rule 4 CSR 240-2.060(7) and/or (12), the applicants must show why the proposed transaction is not detrimental to the public interest. The right to sell property is an important incident of the ownership thereof and "[a] property owner should be allowed to sell his property unless it would be detrimental to the public." *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). "The obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility." *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). To that end, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the asset safely and efficiently. See, *In the Matter of the Joint Application of Missouri Gas Energy et al.*, Case No. GM-94-252 (*Report and Order*, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220.

Under the pleading presenting the transaction between Gateway and UtiliCorp for the Commission's approval, the moving parties assert that the transaction presented will not be detrimental to the public. Therefore, they have the burden of proving that assertion. *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. banc 1991); see also *Dycus v. Cross*, 869 S.W.2d 745 (Mo. banc 1994).

While UtiliCorp and Gateway must prove that the transaction is not detrimental to the public, other parties have asserted that the merger is detrimental in one or more specific areas. The burden of proof is never shifted; however, the burden of going forward with evidence may shift if a prima facie case is made. *Anchor Centre Partners* at 30. Therefore, the parties asserting that the merger is detrimental to the public in a particular way have the burden of going forward by presenting sufficient evidence to support their particular assertions.

Procedural History

On April 19, 2001, Gateway Pipeline Company, Inc. (Gateway), Missouri Gas Company (MGC), and Missouri Pipeline Company (MPC) filed a joint application with the Commission seeking either a determination that the Commission is without jurisdiction or, in the alternative, authorization on an expedited basis, for Gateway, to acquire the outstanding shares of UtiliCorp Pipeline Systems (UPL). The application presented a copy of the Stock Purchase Agreement for the proposed transaction. The applicants also requested a protective order to limit access to highly confidential or proprietary business information.

Under the Stock Purchase Agreement, UtiliCorp is selling, and Gateway is buying, all the outstanding shares of the capital stock of UPL. UPL is, according to the application, the parent and owner of MGC and MPC. UtiliCorp, MPC and MGC are regulated Missouri public utilities. MGC and MPC own and operate intrastate natural gas transmission pipelines in Missouri. UtiliCorp was not a party to the application filed on April 19, 2001.

The Commission issued an order on May 2, 2001, directing the Staff of the Missouri Public Service Commission to file its response concerning jurisdiction. Further responses or any reply to the Staff memorandum were due not later than ten days after the Staff response. The Commission also issued a protective order pursuant to the request by the applicants.

Staff filed its response on May 11, 2001. The Office of the Public Counsel filed its response regarding jurisdiction on May 1, 2001. The applicants filed their reply on May 18, 2001.

On May 24, 2001, the Commission issued an order under a 3-1 vote finding that it had jurisdiction. The order joined UtiliCorp as a necessary party. The Commission ordered the parties to file a tax impact statement showing how the transaction would impact tax revenues of political subdivisions in Missouri. The order also directed notice to counties traversed by the intrastate gas transmission pipelines of MPC and MGC and to the identifiable municipalities and companies owning and operating natural gas distribution systems served by the transmission pipelines. The order provided for public notice of this proceeding.

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On June 1, 2001, Gateway's attorneys entered their appearance on behalf of UtiliCorp. Subsequently, on June 14, these attorneys filed a notice withdrawing as counsel for Gateway, noting the entry of a different law firm to represent Gateway's interests. The Commission granted leave for the withdrawal on June 15.

A tax impact statement was filed by Gateway, MPC and MGC on June 5, 2001, stating that the transaction would have no tax impact on the tax revenues of the political subdivisions in which any structures, facilities or equipment of MPC or MPC are located. On June 11, 2001, the Commission provided the tax impact statement to the parties and to the county clerks for Pulaski, Phelps, Crawford, Franklin, St. Charles, Lincoln and Pike Counties.

On June 11, 2001, the Commission granted the intervention requests of Union Electric Company, d/b/a AmerenUE, Laclede Gas Company (Laclede) and Panhandle Eastern Pipeline Company. No other intervention requests were filed.

Prehearing conferences were held on June 28 and August 1 and 15, 2001. Prefiled direct, rebuttal and surrebuttal testimony, with schedules and exhibits and supplemental testimony, were filed in this case in accordance with usual Commission procedures and pursuant to orders entered in this case.

The Office of the Public Counsel moved the Commission to reclassify some of the highly confidential and proprietary information provided in discovery and in testimony in motions filed on August 1, 7 and 14, 2001. Gateway responded in opposition. On August 28, 2001, the Commission issued its Order Regarding Classification of Responses to Data Requests resolving the classification issues. On August 30, 2001, Gateway requested a clarification regarding proprietary information presented in the text of a data request. On September 25, 2001, the Commission issued an order granting the clarification requested by Gateway.

The hearing for this case was held beginning on September 5 and ending on September 7, 2001. One round of briefs was ordered and was filed on September 18, 2001. Some parties submitted proposed findings of fact and conclusions of law. One party, Panhandle Eastern, elected not to file a brief.

On September 18, 2001, the Municipal Gas Commission, for itself and for the Cities of Cuba, Richland, St. James, Sullivan and Waynesville, Missouri, and for Fidelity Natural Gas, Inc., filed a motion requesting leave to file an amicus brief and also filed their amicus brief with their motion.

On September 24, 2001, UtiliCorp filed an objection to and motion to strike a portion of the brief filed by the Commission's Staff. Staff filed a reply to UtiliCorp's motion on October 1, 2001.

Positions of the Parties

In the application filed on April 19, 2001, Gateway, MPC and MGC asserted that the proposed transaction is not detrimental to the public interest because: 1) the status of MGC and MPC as wholly owned subsidiaries would not change; 2) there will be no change in the operations of MGC or MPC and these companies will continue to provide service to their customers pursuant to the rates, rules, regulations and other tariff provisions of MGC and MPC currently on file with and approved by the Commission until such time as they may be modified according to law; 3) the existing customers of both MGC and MPC will continue to experience quality day-to-day utility service at approved rates and the transaction will be entirely

transparent to them; and 4) the Commission will retain full authority to regulate the rates and terms and conditions of service rendered by MGC and MPC as provided by law.

The Commission's Staff, the Office of the Public Counsel and Laclede all opposed approval of the transaction. This opposition was based upon the assertion that the pipeline operations of MPC and MGC have not been profitable on an after-tax basis; and that Gateway lacks the financial resources and a detailed business plan to support and improve the performance of the pipeline operations to assure continued operation without interruption or significant pricing or service changes. These parties also were critical of the management performance of one of the principals in the ownership structure. These parties asserted that additional costs of the proposed equity and debt structure and costs for expansion of services would be detrimental to Missouri customers resulting in potential service disruptions or a re-bundling and re-pricing of services imposing higher costs for existing services.

These parties were also concerned that aspects of Gateway's business plan would make it more likely that the Commission would lose its jurisdiction over MPC and MGC to the Federal Energy Regulatory Commission (FERC). The parties asserted that changes in regulatory perspectives from a state to federal level and that changes in rate case procedures would be detrimental to Missouri customers.

Because FERC jurisdiction arose as an issue, Gateway has requested a clarification of a restriction in MPC's certificate of service authority regarding the interconnection of MPC's pipeline with the TMP.

AmerenUE expressed "concerns" with the transaction that mirrored those of other parties but did not take a position in support or opposition to the proposed transaction. Panhandle Eastern Pipeline (Panhandle) did not take a specific position and did not file a brief.

Conditions were offered by Staff and by Laclede assuming the Commission approved the transaction. AmerenUE concurred in the recommended conditions.

Findings of Fact

The Missouri Public Service Commission makes its findings of fact having considered all of the competent and substantial evidence upon the whole record. The positions and arguments of all of the parties have been considered in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Companies and Utility Facilities Presented in the Application and in the Stock Purchase Agreement:

The Joint Applicants in the case are Gateway, MPC and MGC. Gateway is a Delaware corporation with offices located in Littleton, Colorado. Gateway is authorized by the state of Missouri to do business in the state as a foreign corporation. Gateway currently conducts no business in the state of Missouri, or elsewhere. It has been created for the specific purpose of acquiring UPL.

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UPL is a wholly owned subsidiary of UtiliCorp. UtiliCorp is a Delaware corporation doing business in the state of Missouri. It provides regulated electric and natural gas utility service to customers in the state of Missouri in those areas certificated to it by the Commission. Pursuant to an order dated May 24, 2001, UtiliCorp was determined to be a necessary party to a full adjudication of the issues presented by the Joint Application. Consequently, the Commission added UtiliCorp as a party to the proceeding.

MPC and MGC are both Delaware corporations. Both companies are engaged in owning and operating natural gas transmission pipelines in the state of Missouri subject to the jurisdiction of the Commission as provided by law. The Commission granted the companies Certificates of Convenience and Necessity in its Case Nos. GA-89-126, GA-90-280, GA-90-276, GA-91-81 and GA-91-82. MPC and MGC are wholly owned subsidiaries of UPL.

MPC transports natural gas for its shippers from a point of interconnection with Panhandle near Curryville, Missouri, in Pike County to several delivery points on the system in the counties of Pike, Lincoln, St. Charles and Franklin to a point of termination in Sullivan, Missouri. The interconnection with Panhandle is MPC's sole intake point for gas delivery.

Generally, MPC transports natural gas on behalf of shippers to requested points along the pipeline system. MPC's shippers are local (gas) distribution companies (LDCs), municipalities operating gas distribution systems, industrial and large commercial natural gas end users, or natural gas marketing companies moving gas on behalf of LDCs, municipalities or natural gas end users behind the LDCs or municipal systems. MPC has ten different delivery interconnects with Laclede, Union Electric Company, Missouri Natural Gas Company and Fidelity Natural Gas. It also has one interconnect with its sister pipeline, MGC, near Sullivan, Missouri.

MGC transports natural gas for its shippers from a receipt point at its interconnect with MPC to several delivery points along its system in the counties of Crawford, Phelps and Pulaski to its point of termination at Fort Leonard Wood, Missouri. The interconnection with MPC is MGC's sole source of transport to its delivery system.

MGC's shippers are LDCs, municipalities, industrial and large commercial natural gas end users, or natural gas marketing companies moving gas on behalf of LDCs, municipalities, or natural gas end users behind the LDCs or municipal systems. MGC has eight delivery interconnects. Three of those are with an LDC, Missouri Public Service (MPS), a division of UtiliCorp, at Rolla, Salem and Owensville. MGC also has delivery interconnects with the municipalities of Cuba, St. James, St. Robert and Waynesville. MGC also delivers natural gas to Fort Leonard Wood.

Schedule 2-1 to Exhibit 16 (rebuttal testimony of James Gray) is a map that shows MPC's interconnection with Panhandle's interstate pipeline in Pike County. MPC's system traverses four Missouri counties: Pike, Lincoln, St. Charles; and Franklin. The map shows MPC pipeline's southernmost point where it interconnects with MGC's pipeline in Franklin County. MGC's pipeline traverses four Missouri counties: Franklin, Crawford, Phelps and Pulaski. MGC has lateral pipelines that enter the Missouri counties of Gasconade and Dent. Presently all

the public utility activities of MPC and MGC occur and are regulated on an intrastate basis.

In addition to holding all of the capital stock of MPC and MGC, UPL also owns a short length of pipe crossing under the Missouri River from Illinois into Missouri, which has been referred to as the Trans Mississippi Pipeline (TMP). The TMP is approximately six (6) miles of pipeline stretching from West Alton, Missouri, under the Mississippi River and into Illinois. The TMP is not currently activated for service. It is physically disconnected from the MPC pipeline.

The Transaction:

According to the terms of a Stock Purchase Agreement entered on April 21, 2001, UtiliCorp has agreed to sell, and Gateway has agreed to buy, all the issued and outstanding shares of the capital stock of UPL. The Stock Purchase Agreement was filed with the application and was also attached as Schedule RCK-4 to the direct testimony of Richard C. Kreul. A diagram marked as Schedule RCK-3 to the direct testimony of Mr. Kreul shows the current and proposed ownership of MPC and MGC. Essentially, Gateway replaces UtiliCorp as the parent of UPL and thus as owner through UPL of MPC and MGC. Gateway, through its acquisition of UPL, will also acquire the TMP.

Under the terms of the Stock Purchase Agreement, Gateway will pay \$63.4 million to buy all the UPL stock. The agreement attributes \$53.1 million of the purchase price to the net book value for the regulated pipeline assets of MPC and MGC (\$32.7 and \$20.4 million respectively), plus \$10.3 million for the remaining assets consisting of the TMP.

A. Source of borrowed funds and terms.

Gateway will finance the purchase using the proceeds of a term loan secured by UPL stock plus the proceeds of an equity investment or subordinated loan from Gateway's parent Mogas Energy LLC (Mogas).

Gateway's lender is identified as Banc One Capital Markets, Inc. (or as a syndicate headed by Banc One). The loan from Banc One will fund a substantial portion of the purchase price Gateway is paying under the Stock Purchase Agreement. All the stock of UPL will be pledged to secure this loan.

Loan terms require Mogas to make an equity investment in Gateway or loan Gateway sufficient funds to pay the remainder of the purchase price set in the Stock Purchase Agreement, and pay all expenses related to the purchase, and, to provide working capital satisfactory to Banc One. Banc One's security interest is superior to all other interests including the debt or equity interest of Mogas. The assets of Gateway or its subsidiaries cannot be encumbered by any lien or sold without Banc One's consent with the exception of limited occurrences in the usual course of business. Gateway cannot merge or consolidate and may not engage in transactions with affiliates that are not on an arms-length basis.

The loan terms impose certain financial covenants on Gateway such as requiring maintenance of financial coverage and performance ratios and funding of a Reserve Account. Gateway must provide its lender un-audited quarterly and audited annual financial reports and must furnish quarterly compliance certificates and other financial information to its lender.

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B. Source of invested funds and terms.

Gateway is wholly owned by Mogas Energy, LLC, a Delaware company. Mogas is owned jointly by Mr. Dennis Langley, Mr. David Ries and TCW Group. The principal investors in Mogas will contribute the balance of funds through Mogas necessary for Gateway to complete its acquisition of all the stock of UPL.

TCW is investing the bulk of funds that will fund the Mogas equity investment in Gateway that in turn is a source of funds to purchase UPL stock, pay transaction costs and provide working capital. TCW Group is a privately held investment company.

Mr. Langley will provide significant cash investment through Mogas to Gateway that is a source of funds to purchase UPL stock, pay transaction costs and provide working capital. Mr. Langley is currently president of two development companies and has 20 years' experience as an attorney and executive in the energy industry including pipeline systems.

Mr. Ries is not investing cash in Gateway or Mogas but will receive an equity interest in Mogas in return for his services arranging the transaction and for his management of Gateway and its proposed subsidiaries, MPC and MGC and the TMP. Mr. Ries will manage the day-to-day operations of Gateway, MPC and MGC. Mr. Ries has 26 years' experience as an engineer, manager and executive in the energy industry primarily with oil and gas pipelines.

At the time of the hearing, details of the equity owners' operating agreement were not finalized or available. However, Mr. Ries' testimony shows that ownership control will rest primarily with Mr. Langley and daily operations and management with Mr. Ries. Initially, TCW will have a higher priority and a larger share in distributions of revenues from the MPC and MGC operations and future TMP revenues. If TCW does not obtain expected returns of and on its investment, its ownership interest in Mogas will increase. If TCW obtains expected returns, its ownership interest in Mogas will gradually decrease and the proportionate interests of Mr. Langley and Mr. Ries will increase.

Operations Following Acquisition:

Gateway intends MPC and MGC to operate and provide services under their existing tariffs and under the jurisdiction and regulation of the Commission. All existing operational procedures and plans will be continued by Gateway. Gateway has agreed to a condition that findings in this Report and Order shall not be considered as findings for ratemaking procedures in any subsequent proceeding.

Mr. Richard C. Kreul, a UtiliCorp Vice President, is currently the president of MPC and MGC. Mr. Kreul provides overall direction and management of MPC and MGC including operations, regulatory compliance, business development and strategic planning. Mr. Kreul is involved in negotiating contract terms with large customers for MPC and MGC. Mr. Kreul holds bachelor and master degrees in mechanical engineering and has more than 20 years' experience in the energy industry and pipeline business. Mr. Kreul will remain with UtiliCorp after the proposed transaction closes and will not continue with MPC or MGC.

Mr. Kreul's functions will be taken over and carried on by Mr. Ries, a principal in Mogas. Mr. Ries holds a bachelor's degree in civil engineering and has 27 years of engineering and management experience that is comparable to that of Mr. Kreul.

Mr. Ries will be the President and Chief Executive Officer of Gateway and will have day-to-day management responsibility for MPC and MGC. No party raised an issue with Mr. Ries' qualifications, ability or character to carry out his responsibilities.

All seven of Gateway's field employees will be offered employment with Gateway. These employees carry out the bulk of the daily and periodic activities of physically operating, maintaining and servicing the pipelines owned by MPC and MGC.

Some MPC and MGC accounting functions are supported by UtiliCorp and these functions will have to be replaced.

Two UtiliCorp employees based in Kansas City handle most negotiations, routine contracting, and scheduling and nomination of pipeline services. These employees will remain with UtiliCorp. These functions will also have to be replaced.

The Stock Purchase Agreement provides a Transitional Services Agreement as Exhibit C and an open ended listing of services to be provided by UtiliCorp as mutually agreed at Schedule 1.1(a). Under the Transitional Services Agreement, UtiliCorp agrees to provide services to Gateway as an independent contractor on a cost plus percentage basis as can be practically accomplished for up to one year after closing.

A concern was expressed that the contracting, negotiation and nominating functions for services were very sensitive and essential to assuring uninterrupted services during a change of ownership, particularly if the Stock Purchase Agreement were closed during the winter heating season. AmerenUE's witness, Julianne Heins, described this concern and the need to have specific employees designated for these functions. Ms. Heins indicated that AmerenUE has had discussions with Mr. Ries about retaining the services of the current UtiliCorp employees performing these functions under contract through the winter heating season. The administration of nominations as provided by the two employees out of UtiliCorp's Kansas City offices is described as a function that can be included in the Transitional Services Agreement that is included with the Stock Purchase Agreement.

Operational Safety:

Mr. John D. Kottwitz, an engineer in the Commission's Safety and Engineering section, offered three safety related conditions should the Commission approve the transaction presented in the Stock Purchase Agreement as follows: 1) MPC and MGC must follow the pipeline safety regulations as contained in 4 CSR 240-40.020, 40.030, and 40.080; 2) MPC and MGC must continue to use an adequate number of qualified personnel to operate and maintain the pipelines and respond to any emergencies along the pipeline and that these personnel must continue to be qualified in accordance with 4 CSR 240-40.030(12)(D); and, 3) there must be no lapse in the call center, dispatch, emergency response, the Supervisory Control and Data Acquisition (SCADA) system, and gas control functions for MPC and MGC during the transition of ownership. Mr. Kottwitz indicated that Gateway would accept these conditions. Gateway indicated its acceptance of these safety conditions in its brief.

Contested Issues

The Staff, the Office of the Public Counsel, Laclede, and to a limited extent AmerenUE, all took positions that the transaction should not be approved based on financial concerns and concerns with Gateway's management of MPC and MGC. These parties assert that the stock purchase transaction is detrimental to the public interest because the financial circumstances of MPC, MGC and Gateway and the management characteristics of Gateway present a risk that MPC and MGC will fail to provide the service and facilities necessary to deliver natural gas transport services safely and adequately at prices that are just, reasonable and allowable by law and by order of the Commission.

Financial concerns were expressed in the context that MPC and MGC have failed to generate anticipated financial returns under UtiliCorp's ownership. Parties opposed to the transaction assert that Gateway lacks the depth of financial resources to sustain the presently marginal operations of MGC and MPC and that Gateway lacks viable options to improve the profitability of MGC and MPC.

The opposing parties, and particularly the Office of the Public Counsel and Laclede, presented arguments questioning the tenor of management operations under an ownership structure with Mr. Langley as a principal.

Financial Viability – Gateway's Financial Resources:

MPC and MGC do not presently generate favorable returns on equity on an after tax basis. Gateway must have resources to sustain current operations to assure that services are not disrupted. Gateway's application and the testimony of Mr. Ries, Gateway's President and CEO, present a reasonable basis to find that Gateway will sustain the current operations of MPC and MGC.

Gateway has arranged equity and short-term debt financing to obtain approximately \$66 million to pay the stock purchase price of \$63.4 million and allow for additional funds to pay transaction costs and to provide working capital. If current operations were not sustained, Gateway's debt and equity investors would be subject to significant losses. These significant debt and equity investments provide a powerful incentive to these investors to sustain operations without interruption.

The proposed loan terms provide Gateway's lender, Banc One, with considerable oversight of Gateway's financial status, limit Gateway's authority to encumber assets, and provide leverage that could draw equity contributions from one or more of the equity investors to avoid a default and forfeiture of Gateway's stock. In addition the loan is for a short term and will require periodic restructuring and associated review and diligence on Banc One's part.

Under a worst case scenario, described by Mr. Ries, the equity holders could lose their investment. Banc One would acquire the UPL stock and proceed to sell MPC, MGC and the TMP to recover the debt principle. The pipeline systems produce sufficient cash flows to pay operating expenses and interest expense. Their highest value can only be realized by their continued operation. If Gateway defaults on its obligations and suffers a foreclosure, Banc One would have no reason to discontinue MPC and MGC operations and suffer a loss of the cash flow supporting the debt service requirements or otherwise impair its collateral.

Mr. Ries testified that after paying cash expenses that Gateway would willingly use available cash flows, reflecting net income plus depreciation, to cover a return for equity investors. This position shows Gateway's commitment to sustain the operations of MPC and MGC and meet its expenses and obligations to lenders and to its equity partners even if the return on equity fails to meet expectations.¹

Financial Viability – the Status Quo:

The present operations of MPC and MGC under UtiliCorp's ownership are not generating a significant return on equity and essentially present a break-even business. UtiliCorp is operating these assets as efficiently as possible. Its field operations are appropriately staffed. In addition, the pipelines are subscribed and operated at their present maximum capacity. To obtain maximum throughput volume and revenues, MPC and MGC have had to flex their rates charging less than their tariffs would permit to meet market competition, primarily from propane and other transporters in the St. Louis market.

Gateway proposes to retain all the existing field personnel, bring in a president and CEO with comparable experience and replace present accounting functions and the staff positions responsible for nominations for pipeline transport capacity. Gateway proposes to maintain existing services under existing tariffs. The near term operations and operational expenses of MPC and MGC will not change. Over a longer term, Gateway intends to increase revenues and profitability by increasing throughput volumes and sales while operating within present tariff rates.

Staff has raised a concern that Gateway will attempt to raise prices and that as a result transport volumes could fall leading to a decline in revenues. The market will not change merely because of Gateway's acquisition. Gateway faces the same incentives to maximize revenues as UtiliCorp. Even if Gateway can sustain volumes and obtain higher prices, the pricing will still be subject to the tariff limits for MPC and MGC. Inasmuch as the tariff rates are just and reasonable, this transaction does not present a public detriment with respect to pricing.

Gateway provided pro forma financial statements for MGC and MPC projecting an increase in operating revenues. However, if revenues remained static, sufficient revenues would be available to pay operating expenses and to service Gateway's interest expense on debt. Thus, Gateway has the financial resources to sustain the present operations of MPC and MGC without interruption. Gateway's shareholders and lenders are knowingly accepting the risk in acquiring UPL and its affiliates under the circumstances presented that desired returns on equity might not be obtained. Whether or not Gateway and its owners realize a favorable return on their investment, the legal obligation and duty of MPC and MGC to provide safe and reliable public utility service at just and reasonable rates is not diminished.

¹The Commission is cognizant that depreciation cash flow also provides a source of funds for reinvestment in assets to assure the long-term viability of a business operation. Using these funds to pay a return on or of an equity investment could impair operations if sustained over a long period of time.

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Financial Viability – Options to Improve Financial Performance:

UtiliCorp through the testimony of Mr. Kreul and Gateway through the testimony of Mr. Ries show a recent development presenting an opportunity for improved financial performance for MPC and MGC.

Presently, MPC's only interconnection to take natural gas into its system is with an interstate pipeline owned and operated by Panhandle. MGC's only interconnection to take natural gas into its system is its sister intrastate pipeline – MPC. LDCs and municipalities and other shippers using MPC and MGC facilities must also contract with Panhandle. In MPC's and MGC's service territories, the final delivered cost of natural gas to an end user must be competitive with propane. MPC's transport costs must be competitive with other transporters serving St. Louis. Panhandle presently has greater pricing leverage for the transportation component of the cost of gas than MPC or MGC. To maximize revenues by shipping at full capacity, MPC and MGC have discounted their rates to be competitive with propane and other competitors for transporting natural gas.

UPL owns an interstate pipeline, TMP, that crosses from Missouri into Illinois. This pipeline could be connected to MPC under appropriate authority and circumstances. However, excess transport capacity and infrastructure has not been available on the Illinois side of the Mississippi to facilitate gas transport service into Missouri and make interconnection physically or economically feasible.

Natural Gas Pipeline (NGPL) is building a pipeline to transport natural gas into the east Illinois area. This recent development will provide additional transport capacity and infrastructure on the Illinois side of the Mississippi to facilitate gas transport service into Missouri. As many as three interstate pipelines, including Panhandle and NGPL, could be placed in a more competitive status. Interstate pipelines operated by MRT and NGPL presently offer lower transport prices than Panhandle.

MPC and MGC could benefit from a second interconnection in several ways. First, an increase in interstate pipeline capacity would promote price competition and lower upstream shipping costs allowing a margin for MPC and MGC to increase their rates closer to their maximum rates authorized by tariff. End users might see some price decrease or no change.

Second, MPC could become more competitive with other shippers into the St. Louis market and gain volumes in that market.

Third, Gateway, the parent of MPC and MGC, would have an additional source of revenues from TMP to support its debt and equity, relieving some of the operating pressures on these companies.

Fourth, for MPC a second interconnection point could increase its shipping capacity with minimal capital investment. MPC could market additional volumes at or near present prices.

Fifth, greater upstream shipping capacity at lower prices could justify investments in additional compression and other upgrades to increase shipping volume throughout the entire MPC and MGC systems. MPC and MGC could market additional transport volumes at or near present pricing to compete against propane.

Sixth, a second interconnection would enhance service reliability.

Quality of Management Operations:

Laclede, the Office of the Public Counsel and to a lesser extent Staff, all presented concerns with Mr. Langley's holding a controlling ownership interest. These management concerns were based upon Mr. Langley's previous involvement in the ownership and operations of Kansas Pipeline Partnership (KPP). Laclede presented evidence that KPP, in its Kansas pipeline and gas operations, had obtained partial successes in obtaining higher negotiated and contracted rates and had obtained regulatory relief to improve its business profitability, but had done so at the expense of consumers and competitors, and had done so with the additional expenses and burdens of litigation.

Sharp tactics or hard negotiation strategies do not present extraordinary concerns. While the interests of consumers and competitors are often harmonized in proceedings before the Commission, win-win situations are not always achieved. The evidence presented in this proceeding serves as forewarning to all the parties and the Commission that MPC and MGC may take a more aggressive competitive and regulatory posture in the future. But this evidence does not rise to a level that supports a finding of public detriment.

The record shows further that Mr. Ries rather than Mr. Langley will have day-to-day charge of the business affairs, management and contracting for MPC and MGC. Mr. Ries demonstrated willingness in his testimony to negotiate fairly with any customer and particularly Laclede.

The record shows that MPC and MGC will continue to operate under the same tariffs and Commission rules and regulations after the acquisition as before. Laclede and AmerenUE expressed concern that business practices and customer relationships are not confined solely to terms stated in a utility tariff. However, the tariffs supply the essential terms and prices under which services are provided.

MPC and MGC are established intrastate gas transport companies with an existing client base and not a start-up. In contrast to the issues presented by Mr. Langley's activities in Kansas, problems that may arise with MPC and MGC are more likely to be incremental rather than overwhelming or cascading. The Commission finds that Mr. Langley's ownership interest does not present a detriment to the public.

Commission vs. FERC Jurisdiction:

Every party in opposition to the Stock Purchase Agreement as well as AmerenUE expressed concern with the possibility that the Commission's jurisdiction over the MPC and MGC pipelines could be lost to FERC and that Missouri's loss of jurisdiction would present a public detriment.

At the present time, MPC and MGC are physically intrastate pipelines and there is no basis for FERC to assert jurisdiction. However, the TMP would be an interstate pipeline under FERC jurisdiction if it were activated. If that pipeline were interconnected with MPC, an affiliate, FERC might assert jurisdiction over MPC and MGC since these pipelines could be viewed as providing interstate service by reason of their affiliated status and interconnection with the TMP.

The parties cited examples of cases presenting affiliate entities where jurisdiction remained with the state and other cases where jurisdiction was taken by FERC. The cases apparently turn on their particular facts.

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Under the federal Natural Gas Act, as amended, Section 1(c) provides an exception to federal jurisdiction. A pipeline presenting FERC jurisdictional services can retain its intrastate jurisdictional status if all the gas the pipeline receives from out of state is consumed within the state and the pipeline is regulated by the state commission. This exception is referred to as the Hinshaw exemption.

There are two primary reasons why FERC jurisdiction could be considered a public detriment in comparison to state jurisdiction. First, Missouri and federal rate case procedures differ. In Missouri a tariff filing presenting a rate increase can be suspended pending the Commission's decision and in addition state law sets stringent time limitations for resolving rate cases. In contrast, in federal rate cases a rate increase can go into effect early in the process subject to refund and the cases sometimes take several years to resolve.

Secondly, Missouri has prohibited MPC and MGC from bypassing LDCs and municipal systems. FERC generally allows bypass. Bypass occurs where a transmission pipeline serves a customer directly who would otherwise be served by an LDC. A pipeline may actively market to large users and cause a loss of revenues for LDCs. The LDCs could, in turn, shift fixed costs to other, often smaller consumers, by increasing prices.

Regulatory differences are a factor the Commission should consider. However, offsetting this concern in this case is the fact that an interconnection could greatly improve the poor business performance of MPC and MGC. Furthermore, bringing additional lower cost gas supplies into Missouri could benefit Missouri consumers directly as well as provide the security of an additional source of transport and supply for natural gas.

Gateway has offered a condition that in the event of an interconnection between the MPC and TMP the interconnection would be on a one-way basis only to flow gas into the state and into the MPC system to assure continued state jurisdiction under the Hinshaw exemption.

Connection Restriction Presented in Certificate of MPC:

MPC was originally certificated in 1989. Most of its pipeline assets are converted crude oil pipelines MPC acquired from Amoco. See, Case No. GA-89-126, Report and Order 8-1-89. MGC was certificated in Case No. GA-90-280 (MPC obtained a certificate to build/extend facilities in St. Charles County in this case also). UtiliCorp acquired MPC and MGC in 1994 for \$55.4 million - subsequently adjusted. See, Case No. GM-94-252, Report and Order dated October 12, 1994.

The 1989 and 1994 orders contain language requiring physical separation of MPC's intrastate pipeline from the TMP. In light of issues raised during this case, Gateway is requesting clarification of this language.

The 1989 order requires: "the physical separation of the intrastate pipeline from the portion of the Applicant's segment crossing the state boundary into Illinois."

The 1994 order states: "As to the physical separation of MPC's intrastate pipeline from a portion of a pipeline which crosses the Mississippi River, all parties agree the prohibitions against connecting the intrastate system to the interstate system is a condition which was imposed at the time the certificate was issued to MPC in Case No. GA-80-126, and that it will remain a condition of the certificate if transferred."

The certificate restriction in the 1989 order, particularly in light of the reference in 1994, shows that this restriction is intended to assure the state jurisdictional status of MPC. The greatest assurance to preventing FERC jurisdiction is to maintain a physical separation of MPC and the TMP. However, doing so simply to prevent a loss of state jurisdiction could preclude a significant opportunity to improve the profitability of MPC and MGC with minimal negative effects on consumers. An additional interconnection to bring gas into the state also presents benefits of lower cost gas services through competition and greater service reliability.

If TMP becomes operational, it will be held in a different company that would be under FERC jurisdiction and pursuant to Gateway's concession, an interconnection with MPC can be restricted to flow gas only into Missouri. With the conditions that the TMP be held in a corporation separate from MPC and that gas flow be restricted so that under an interconnection of MPC and TMP gas will flow only into Missouri, the Commission finds that the 1989 certificate restriction can be modified to allow interconnection.

Conditions:

This Report and Order has previously addressed certain conditions. Staff's safety-related conditions were not contested and will be adopted. The findings in this case will not affect or apply to any subsequent ratemaking proceeding. Gateway has voluntarily offered conditions related to assuring continued state jurisdictional status for MPC and MGC and these will be adopted.

Laclede offered a list of seven conditions. The first proposed condition suggests a rate cap for a period of five years and a prohibition on rate restructuring. This condition relates to matters of private contract or matters best addressed in a tariff filing. Therefore, this condition is rejected.

Laclede's second condition suggests a rate freeze associated with lost volumes or increased expenditures. These are matters of private contract of matters best left for a tariff filing. Therefore, this condition is rejected.

Laclede's third condition is that MPC and MGC certificates should continue to forbid bypass. It is not necessary to order a condition that presently exists.

Laclede's fourth condition is that MPC and MGC should be required to provide existing users a right of first refusal for firm transportation. This is a matter that can be left to contract.

Laclede's fifth condition is that MPC and MGC should be prohibited from taking any actions that would subject them to FERC jurisdiction. The Commission has previously addressed this condition.

Laclede's sixth condition would require MPC and MGC to submit documentation showing that any plan to add firm transportation customers increasing peak throughput will not increase costs or lessen service reliability. This request presents an imposition on MPC and MGC that is burdensome and unnecessary absent a bad track record in Missouri. Such a condition is not warranted at this time.

Laclede withdrew its seventh condition.

Staff proposed seventeen conditions in its brief as Attachment A. Proposed conditions 1, 9, 16 and 18 all relate to issues that would arise in a rate case. The Commission will not prejudge these matters. Nothing in this Report and Order

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should be considered a finding regarding ratemaking treatment for any matter presented in this case or arising in the future.

Staff conditions 4, 5, 7 and 8 all relate to issues that would arise in a case presenting a stock or debt issuance or the creation of a lien on the property of a public utility. This Report and Order does not address or authorize any stock or debt issuance or any lien on the property of a public utility.

Staff condition 2 relates to the interconnection of the MPC pipeline system with the TMP and the current restriction that the MPC system be physically separated from the TMP. The Commission is conditionally waiving this certificate restriction.

Staff condition 3 requests continuance of "bypass" restrictions. The certificates of MPC and MGC presently prohibit bypass of local distribution systems and these restrictions are not affected by this Report and Order.

Staff condition 13 requires Gateway to comply with the Commission's affiliate transaction rule. This Report and Order does not waive or alter the application of the Commission's affiliate transaction rule.

Staff condition 14 would require Gateway to file tariffs. Gateway is not a public utility company. The tariffs of MGC and MPC are not affected or changed in this case.

Staff conditions 10, 11, and 12 relate to safety conditions agreed and accepted by the applicants and these will be adopted.

Staff conditions 6, 15 and 17 relate to the obligation of Gateway, MPC and MGC to report certain information to the Commission's Staff regarding the completion of the Stock Purchase Agreement, compliance with conditions and financial and service performance of MPC and MGC or their affiliates. The Commission has complete investigative powers to obtain information necessary to carry out its duties. The Commission will require certain information to be reported regarding the matters presented in this case. However, the Commission, the Staff and the Office of Public Counsel are not precluded from requesting and obtaining additional information in the future.

The Commission finds that it will require, as a condition of approval, that Gateway cooperate fully with the Commission's Staff to keep it informed of its financial status and performance. In this regard the Commission will require Gateway to provide the Commission's Staff with all final financing and equity investment agreements with pricing and contribution amounts in regard to Gateway's acquisition of UPL's stock. Further, Gateway shall provide the Commission's Staff with all reports and notices filed with Banc One or any successor lender for a period of five years and shall provide the Commission's Staff with documentation for any short-term or long-term financing undertaken to replace the credit facility provided by Banc One.

The Commission also finds that if the transaction is closed during the period of November 1, 2001, to March 31, 2002, that Gateway and UtiliCorp shall enter a Transitional Services Agreement for Gateway to retain the services of UtiliCorp employees for the administration of nominations during the 2001-2002 winter heating season.

Amicus Brief:

On September 18, 2001, the Municipal Gas Commission of Missouri (MGCM) for itself and on behalf of the cities of Cuba, Richland, St. James, Sullivan, and

Waynesville, Missouri and for Fidelity Natural Gas, Inc., filed a joint request to file a brief as amicus curiae and filed their amicus brief.

The request states a reasonable basis in support of the interests of these entities in this case. No party opposed the filing of this amicus brief. The brief will be accepted.

The amicus brief addressed the issues presented in this case and opposed approval of the Stock Purchase Agreement presenting the same grounds and arguments as presented by other parties. This Report and Order addresses the issues and arguments presented in the amicus brief.

Pending Motions Disposed:

In its brief, Staff raised a procedural issue that UtiliCorp was not a party to the application filed in this case and that the application did not satisfy the requirements of an application to sell or otherwise dispose of property. Staff did not file a motion to dismiss. Nevertheless, UtiliCorp responded with a Motion to Strike and Staff filed a reply.

Staff's argument is not persuasive. The Commission recognized that UtiliCorp was a necessary party and joined UtiliCorp in an order issued on May 24, 2001. Furthermore, the Commission ordered UtiliCorp to file a tax impact statement as required under Section 393.190.1, RSMo 2000, and in an application for authority to sell, transfer or assign assets under 4CSR 240-2.060(7). UtiliCorp complied.

UtiliCorp was joined as a party and was not an applicant for purposes of the applicant filing information required under 4 CSR 240-2.060(1). However, this information has been presented to the Commission in previous applications filed by UtiliCorp. The remaining information required under this rule is not material to the issues presented in this case. There is no material or substantive deficiency in the application or status of this case to warrant a dismissal.

All remaining motions not specifically addressed or otherwise disposed in this Report and Order are denied.

Conclusions of Law

The Missouri Public Service Commission has jurisdiction over the parties and the subject matter of this case pursuant to Section 393.190, RSMo 2000.

The Missouri Supreme Court stated the Commission's duty and the interests to be balanced in transactions as presented in this case in *State ex. Rel City of St. Louis v. Public Service Commission*, 73 S.W.2d 393 (Mo. 1934).

To prevent injury to the public, in the clashing of private interest with public good in the operation of public utilities, is one of the most important functions of public service commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. "In the public interest", in such cases, can reasonably mean no more than "not detrimental to the public."

Id. at 400.

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The owners of this stock should have something to say as to whether they can sell it or not. To deny them that right would be to deny them an incident important to ownership of property ... a property owner should be allowed to sell his property unless it would be detrimental to the public.

Id.

The Commission applies this standard in transactions presented under Section 393.190, RSMo, and pursuant to Commission Rule 4 CSR 240-2.060(7) / (12), the Applicants must show why the proposed transaction is not detrimental to the public interest.

“The obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility.” *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). To that end, the Commission has previously considered such factors as the applicant’s experience in the utility industry; the applicant’s history of service difficulties; the applicant’s general financial health and ability to absorb the proposed transaction; and the applicant’s ability to operate the asset safely and efficiently. See *In the Matter of the Joint Application of Missouri Gas Energy et al.*, Case No. GM-94-252 (*Report and Order*, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220.

The Commission concludes that the transaction presented in this case should be approved because after considering all the evidence presented Gateway and UtiliCorp have shown that completion and closing of their Stock Purchase Agreement is not detrimental to the public interest. The issues of detriment presented by the parties in opposition are not sufficient to present a detriment to the public, or are offset by benefits or are mitigated by the conditions approved by the Commission.

Decision

The application authorizing Gateway Pipeline Company to buy all the shares of UtiliCorp Pipeline Systems under a Stock Purchase Agreement with UtiliCorp United Inc. is approved subject to the conditions of this Report and Order.

IT IS THEREFORE ORDERED:

1. That the application authorizing Gateway Pipeline Company, Inc. to buy all the shares of UtiliCorp Pipeline Systems under a Stock Purchase Agreement with UtiliCorp United Inc. is approved subject to the conditions of this Report and Order.
2. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transaction presented. The Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.
3. That Missouri Pipeline Company and Missouri Gas Company shall follow the pipeline safety regulations as contained in 4 CSR 240-40.020, 40.030, and 40.080.
4. That Missouri Pipeline Company and Missouri Gas Company shall continue to use an adequate number of qualified personnel to operate and maintain the pipelines and respond

to any emergencies along the pipeline and that these personnel must continue to be qualified in accordance with 4 CSR 240-40.030(12)(D).

5. That there shall be no lapse in the call center, dispatch, emergency response, the Supervisory Control and Data Acquisition (SCADA) system, and gas control functions for Missouri Pipeline Company and Missouri Gas Company during the transition of ownership.

6. That Gateway Pipeline Company, Inc., Missouri Pipeline Company and Missouri Gas Company shall cooperate fully with the Commission's Staff to keep the Commission informed of their financial status and performance. In this regard the Commission will require Gateway Pipeline Company, Inc. and its affiliates to provide the Commission's Staff with all final financing and equity investment agreements with pricing and contribution amounts in regard to Gateway Pipeline Company, Inc.'s acquisition of UtiliCorp Pipeline Systems' stock. Further, Gateway Pipeline Company, Inc. and its affiliates shall provide the Commission's Staff with all reports and notices filed with Banc One or any successor lender for a period of five years and shall provide the Commission's Staff with documentation for any short-term or long-term financing undertaken to replace the credit facility provided by Banc One.

7. That if the stock purchase transaction is closed during the period of November 1, 2001, to March 31, 2002, that UtiliCorp United Inc. and Gateway Pipeline Company, Inc. with its affiliates shall enter a Transitional Services Agreement for Gateway Pipeline Company, Inc. or its affiliates to retain the services of UtiliCorp United Inc. employees for the administration of nominations for Missouri Pipeline Company and Missouri Gas Company during the 2001-2002 winter heating season.

8. That if Gateway Pipeline Company, Inc. causes the Trans Mississippi Pipeline to become operational it will be held in a company separate from Missouri Pipeline Company and from Missouri Gas Company and that any interconnection with the system of Missouri Pipeline Company shall be restricted to flow gas only into Missouri in order to assure continued state jurisdiction under the Hinshaw exemption. So long as these conditions are met the restriction in Missouri Pipeline Company's certificate of authority issued in 1989 shall be waived to allow interconnection.

9. That all motions not previously ruled upon by the Commission in this case are denied, all objections not previously ruled upon are overruled, and all evidence the admission of which was not specifically denied is admitted.

10. This Report and Order shall become effective on October 18, 2001.

Simmons, Ch., Murray, Lumpe, and Gaw, CC., concur;
and certify compliance with the provisions of
Section 536.080, RSMo 2000.

In the Matter of Mark Twain Communications Company's Proposed Tariff to Introduce its Wireless Termination Service.*Case No. TT-2001-646**Decided October 16, 2001*

Telecommunications §§14, 45. The Commission approved a wireless termination service tariff for Mark Twain Communications Company (a Competitive Local Exchange Carrier, or CLEC), finding that the obligation to negotiate in good faith imposed by the Telecommunications Act of 1996 was an adequate safeguard for any wireless carrier dissatisfied with the provisions of the wireless termination tariff. The Commission also concluded that it would be fundamentally inequitable to allow Independent Local Exchange Carriers to recover termination costs through termination service tariffs, but to deny a CLEC the same opportunity.

ORDER APPROVING TARIFFS**Procedural History:**

On April 26, 2001, Mark Twain Communications Company, a competitive local exchange company (CLEC), filed a proposed wireless termination service tariff. The tariff sheets bear an effective date of May 26, and have been suspended by orders of the Commission until October 23.

On May 22, AT&T Wireless Services, Inc. (AT&T Wireless) filed a motion to suspend the tariff filing. AT&T Wireless is a commercial mobile radio services (CMRS) provider. AT&T Wireless alleges that the tariff filing is unlawful because it does not provide for reciprocal compensation between Mark Twain and CMRS providers. AT&T Wireless alleges that local reciprocal compensation between Mark Twain and AT&T Wireless currently occurs on a "bill and keep" basis. AT&T Wireless asserts that this arrangement, or another reciprocal compensation arrangement, must continue. AT&T Wireless also asserts that the rates do not appear to be based upon a proper cost study. AT&T Wireless states that wireless carriers can require incumbent local exchange carriers (ILECs) to negotiate interconnection agreements, but that it cannot require Mark Twain to do so because it is not an ILEC.

On May 23, Mark Twain filed a response to AT&T Wireless's motion to suspend. Mark Twain stated that its proposed tariffs are patterned after tariffs approved by the Commission for various small ILECs, and the rates were developed using the same methods that those ILECs used. Mark Twain asserted that they are therefore consistent with the Commission's decisions in Case No. TT-2001-139 (the small company wireless termination service tariffs case) and TO-99-596 (the CLEC access rate case). Mark Twain stated that AT&T Wireless is seeking to retry issues that have already been decided by the Commission. Mark Twain asserted that AT&T Wireless's claim that wireless traffic is currently being terminated to Mark Twain under a bill and keep arrangement is inaccurate. It stated that it has not agreed to such an arrangement and one has not been approved by the Commission. Mark Twain noted that it does not have any reciprocal traffic going to AT&T Wireless. Mark

Twain asserted that AT&T Wireless has been sending wireless traffic to Mark Twain and paying Mark Twain no terminating compensation.

On May 24, 2001, the Staff of the Commission filed a pleading opposing AT&T Wireless's motion to suspend. Staff, like Mark Twain, pointed to Case No. TT-2001-139 as precedent for approval of the tariff sheets at issue.

On July 5, the Commission granted intervention to Green Hills Area Cellular Telephone, Inc. d/b/a Green Hills Telecommunications Services, Fidelity Communications Services I, Inc. and Fidelity Communications Services II, Inc. (all of which support Mark Twain's position), and Sprint Spectrum, L.P d/b/a Sprint PCS (which supports AT&T Wireless's position).

Stipulated Facts:

The parties stipulated to the following facts, and the Commission accepts them for purposes of resolving this case.

1. Mark Twain is a competitive local exchange company ("CLEC") providing telecommunications services in the Missouri exchanges of Ewing, La Belle, and Lewistown pursuant to a certificate of service authority issued in Case No. TA-98-305.¹

2. AT&T Wireless and Sprint PCS are Commercial Mobile Radio Service providers ("wireless carriers") operating in the state of Missouri.

3. In Case No. TT-2001-139,² the Missouri Public Service Commission ("Commission") approved wireless termination tariffs for a group of Missouri's small ILECS. AT&T Wireless and Sprint PCS intervened and participated fully in Case No. TT-2001-139 before the Commission, and they are presently appealing the Commission's decision in the Cole County Circuit Court.

4. On April 26, 2001, Mark Twain filed proposed tariff sheets designed to implement rates, terms and conditions for its wireless termination service. In all material respects, Mark Twain's tariff is identical to the tariffs approved by the Commission in Case No. TT-2001-139.

5. Mark Twain developed its proposed tariff rate using the same methodology that the small ILECs used in developing the rates in their respective tariffs.³ Specifically, Mark Twain's proposed tariff rate for its wireless termination service is the sum of Mark Twain's currently approved intrastate traffic-sensitive access rate elements (\$0.0385), plus a two cent (\$0.02) contribution to the local loop, for a total wireless termination service rate of \$0.0585. This is the same rate (\$0.0585)

¹ *In the Matter of the Application of Mark Twain Communications Company for a Certificate of Service, Authority to Provide Basic Local Telecommunications Service in Portions of the State of Missouri and to Classify Said Services and the Company as Competitive*, Case No. TA-98-305, *Order Granting Certificate of Service Authority*.

² *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce its Wireless Termination Service*, Case No. TT-2001-139, *Report and Order*, issued Feb. 8, 2001.

³ See *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service*, Case No. TT-2001-139, *Report and Order*, issued Feb. 8, 2001, p. 23, 40-42.

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that was approved by the Commission in Case No. TT-2001-139 for the three small incumbent local exchange companies ("ILECs") that operate in former GTE exchanges (i.e. Cass County Telephone Company, BPSTelephone Company, and Ozark Telephone Company). Mark Twain is also operating in former GTE exchanges.

6. On or about May 22, 2001, AT&T Wireless filed its motion to suspend Mark Twain's proposed tariffs.

7. On May 24, 2001, the Commission suspended Mark Twain's proposed wireless termination service tariff sheets.

8. On June 13, 2001, Sprint PCS filed its Application to Intervene.

9. None of the wireless carriers operating in Missouri have a direct interconnection with Mark Twain. Instead, these wireless carriers are indirectly connected with Mark Twain via the facilities of Southwestern Bell Telephone Company ("SWBT"). Wireless traffic is delivered to Mark Twain over common trunk groups from SWBT, along with other interexchange traffic. As a result, Mark Twain cannot identify or block this wireless traffic.

10. At present, both AT&T Wireless and Sprint PCS are terminating wireless-originated traffic to Mark Twain over the intermediate facilities of SWBT. According to the Cellular Terminating Usage Summary Report ("CTUSR") information provided by SWBT, Mark Twain has been receiving traffic from AT&T Wireless since March 5, 1999, and from Sprint PCS since February 5, 2001.

11. To date, neither AT&T Wireless, Sprint PCS, nor Mark Twain have made any request to negotiate an interconnection agreement or a reciprocal compensation agreement pursuant to the Telecommunications Act of 1996 ("the Act").

12. There is no Commission-approved reciprocal compensation agreement or interconnection agreement pursuant to the Act between Mark Twain and AT&T Wireless or Sprint PCS.

13. AT&T Wireless and Sprint PCS have interconnection agreements with SWBT that were approved by the Commission. The interconnection agreement between AT&T Wireless and SWBT provides, among other things:

Traffic to Third Party Providers [AT&T Wireless] and SWBT shall compensate each other for traffic that transits their respective systems to any Third Party Provider, as specified in Appendix PRICING. The Parties agree to enter into their own agreements with Third Party Providers. SWBT agrees that it will not block traffic involving Third Party Providers with whom [AT&T Wireless] has not reached agreement. In the event that [AT&T Wireless] does send traffic through SWBT's network to a Third Party Provider with whom [AT&T Wireless] does not have a traffic interchange agreement, then [AT&T Wireless] agrees to indemnify SWBT for such traffic pursuant to Section 18 of this Contract.⁴

⁴Section 3.1.3, Interconnection Agreement, approved in Case NO. TO-97-474.

Sprint PCS' interconnection agreement with SWBT provides, among other things:

Traffic to Third-Party Providers [Sprint PCS] and SWBT shall compensate each other for traffic that transits their respective systems to any Third-Party Provider, as specified in Appendix PRICING. The Parties agree to enter into their own agreements with Third-Party Providers. In the event that [Sprint PCS] does send traffic through SWBT's network to a Third-Party Provider with whom [Sprint PCS] does not have a traffic interchange agreement, then [Sprint PCS] agrees to indemnify SWBT for any termination charges rendered by a Third-Party Provider for such traffic.⁵

14. All of Mark Twain's traffic that is destined for the NXXs of wireless carriers operating in Missouri, including AT&T Wireless and Sprint PCS, is currently dialed: (a) on a 1+ basis and carried by Mark Twain's customers' presubscribed interexchange carrier ("IXC"); or (b) on a 101XXXX basis and carried by an IXC.

15. It is technically possible for Mark Twain to send traffic destined for the NXXs of wireless carriers in the same manner that wireless carriers route traffic destined for the NXXs of Mark Twain local exchange customers. (i.e. over facilities of intermediate LECs or dedicated facilities).

16. In addition to the foregoing facts, the parties may cite and make reference to any relevant facts contained in the evidentiary record from Case No. TT-2001-139, including all exhibits and the transcript.

Discussion:

The only difference between the facts in this case and those in Case No. TT-2001-139 is that the company filing the proposed tariff herein is a CLEC and the companies filing the tariffs in TT-2001-139 were small ILECs. The parties have stipulated that: "In all material respects, Mark Twain's tariff is identical to the tariffs approved by the Commission in Case No. TT-2001-139." The Commission adopts and incorporates by reference the Report and Order issued in Case No. TT-2001-139. Accordingly, the only issue the Commission will address is whether the proposed tariff in this case (which, according to the decision in Case No. TT-2001-139, would be lawful and reasonable if proposed by an ILEC) is not lawful and reasonable because it was instead proposed by a CLEC.⁶ In other words, what

⁵ Section 3.1.3, Interconnection Agreement, approved in Case No. TO-98-29.

⁶ The parties identified the following as the only issues for the Commission to decide:

1. Is Mark Twain's wireless termination service tariff lawful and reasonable?
2. Is the rate contained in Mark Twain's wireless termination service tariff lawful and reasonable?
3. What obligations do CLECs and wireless carriers have to establish interconnection agreements and reciprocal compensation arrangements pursuant to the Telecommunications Act of 1996?

Because the proposed tariff, including the rate, is identical to those found lawful and reasonable in TT-2001-139, and because the Commission is following the Report and Order in that case, the Commission need not address the first two issues.

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are the differences between ILECs and CLECs that would make it reasonable for ILECs to have wireless termination service tariffs but unreasonable for a CLEC to?

The differences, such as they are, are created by the Telecommunications Act of 1996. Pursuant to the Telecommunications Act, all local exchange carriers, both ILECs and CLECs, have the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.⁷ An additional duty to negotiate in good faith is imposed upon ILECs, but not explicitly upon CLECs.⁸ But the fact that the Telecommunications Act requires CLECs to establish reciprocal compensation arrangements necessarily implies a duty to negotiate such arrangements in good faith. Under certain circumstances, the Telecommunications Act requires ILECs to submit to compulsory arbitration if negotiations fail, but imposes no such requirement on CLECs. This, then, is the only difference between ILECs and CLECs (at least with respect to the wireless termination service tariff at issue).⁹

AT&T Wireless and Sprint PCS argue that there is a difference between ILECs and CLECs with respect to the requirement to negotiate in good faith. In its motion to suspend or reject the proposed tariff AT&T Wireless stated:

In previously addressing wireless termination tariffs [in the Report and Order in TT-2001-139] the Commission has indicated that if wireless carriers are dissatisfied with the tariffed rates they may take advantage of 47 U.S.C. 251(c) which requires incumbent LECs to negotiate interconnection agreements in good faith.¹⁰

First, as noted above, the fact that CLECs have a duty to enter into such agreements necessarily means that they do have a duty to negotiate in good faith, even though the Telecommunications Act does not explicitly say so. Second, it is somewhat disingenuous for AT&T Wireless and Sprint PCS to argue that there is no requirement for Mark Twain to negotiate in good faith when neither has even attempted to negotiate an agreement. The argument of AT&T Wireless and Sprint PCS about the lack of a duty to negotiate in good faith is not persuasive.

⁷ Specifically, 47 U.S.C. Section 251(b)(5).

⁸ 47 U.S.C. Section 251(c).

⁹ AT&T Wireless and Sprint PCS argue that another difference is the relative freedom a CLEC has as a competitive carrier to raise its rates. The Commission herein finds that the rates in the tariffs as filed are lawful and reasonable. The fact that the law allows Mark Twain to change those rates with less regulatory oversight than some ILECs is not a valid reason to reject lawful tariffs.

¹⁰ The same sentence, with certain grammatical errors, appears in the joint initial brief of AT&T Wireless and Sprint PCS at page 10.

AT&T Wireless and Sprint PCS also argue, in their initial brief, that:

When that [negotiation] process reaches impasse, either the incumbent LEC or presumably, the wireless carrier may force a decision on disputed issues by filing a petition for arbitration with the appropriate state commission. Because Mark Twain is not an incumbent LEC, it is not subject to the provisions of the [Telecommunications] Act that permit wireless carriers to petition the Commission for arbitration. Thus, the protection the Commission has previously relied upon in approving wireless termination tariffs is unavailable to [AT&T Wireless] and Sprint PCS.¹¹

Once again, one of the protections (the duty to negotiate in good faith) is available; it is only the compulsory arbitration provision of the Telecommunications Act that is unavailable. The Commission finds that the obligation to negotiate in good faith, even without compulsory arbitration, is an adequate safeguard for any wireless carrier that is dissatisfied with the provisions of the wireless termination tariff.

Furthermore, Mark Twain points out in its briefs that it would be fundamentally inequitable to allow ILECs to recover termination costs through termination service tariffs, but to deny a CLEC the same opportunity. The Commission agrees. The intent of the Telecommunications Act is to encourage competition, and preventing one of the few CLECs that is trying to compete outside of urban areas from using the same method of collecting termination costs used by ILECs would frustrate that intent. A level playing field for competition requires that a CLEC be able to use the same tools to recover costs that ILECs use.

Although the Commission is approving Mark Twain’s proposed tariff, it notes that this tariff approval in no way relieves Mark Twain of its obligation to negotiate interconnection agreements (with AT&T Wireless, Sprint PCS, or any carrier) in good faith.¹²

IT IS THEREFORE ORDERED:

1. That the following tariff sheets filed on April 26, 2001, by Mark Twain Communications Company, and assigned Tariff File No. 200101088, are approved for service on and after October 23, 2001:

PSC MO. NO. 2
Original Title Page
Original Sheet A
Original Sheet 1 through Original Sheet 6

2. That the motion to reject or suspend tariffs filed on May 22, 2001, by AT&T Wireless Services, Inc., is denied.

¹¹AT&T joint initial brief at page 10. A very similar argument is raised at page 11 of the joint reply brief of AT&T Wireless and Sprint PCS.

¹² The Commission need not, to resolve this case, determine whether Mark Twain has met this obligation to date.

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3. That this order shall become effective on October 26, 2001.

Simmons, Ch., Lumpe and Gaw, CC., concur
Murray, C., dissents, dissenting opinion attached

Mills, Deputy Chief Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I respectfully dissent from this Report & Order for many of the same reasons I would have dissented from the Report & Order in Case No. TT-2001-139. The issue is not whether local exchange companies are entitled to compensation for the exchange of traffic with commercial mobile radio service (CMRS) providers, but whether tariffs are the appropriate method of providing that compensation. I contend they are not.

Furthermore, tariffs are particularly inappropriate in the case at hand. Mark Twain, as a competitive local exchange company (CLEC), has pricing flexibility that effectively removes the Commission's ability to prevent potential pricing abuse. Additionally, the protection that the majority relied upon in Case No. TT-2001-139, is not present here because of Mark Twain's status as a CLEC, rather than an incumbent local exchange carrier (ILEC). Mark Twain, unlike an ILEC, could not be forced by a CMRS provider to negotiate or arbitrate an interconnection agreement. Approval of the proposed tariff will significantly reduce any possibility of the parties arriving at a mutually agreeable resolution of interconnection issues.

Director of the Manufactured Housing and Modular Units Program of the Public Service Commission, Petitioner, v. Wightman Enterprises, Inc., doing business as Lee's Mobile Homes, Respondent.*

*Case No. MC-2002-12
Decided October 18, 2001*

Manufactured Housing § 1. The Commission set aside a previous default order against Wightman. The Commission may set aside a default order for good cause. The Commission found good cause because Wightman attempted to respond timely and because Wightman claims to have corrected the problems about which the Director complains.

ORDER SETTING ASIDE DEFAULT

On September 18, 2001, the Commission on its own motion entered a default against Respondent Wightman Enterprises, Inc., doing business as Lee's Mobile Homes. The Commission acted pursuant to Commission Rule 4 CSR 240-2.070(9), which provides:

*See Page 461 for another order in this case.

If the respondent in a complaint case fails to file a timely answer, the complainant's averments may be deemed admitted and an order granting default entered. The respondent has seven (7) days from the issue date of the order granting default to file a motion to set aside the order of default and extend the filing date of the answer. The commission may grant the motion to set aside the order of default and grant the respondent additional time to answer if it finds good cause.

Respondent moved on September 26 to set aside the entry of default. Petitioner the Director of the Manufactured Housing and Modular Units Program responded in opposition on October 9. Thereafter, Respondent replied on October 12.

A default may be set aside upon a finding of good cause for Respondent's failure to timely answer. Respondent states, first, that it did attempt to timely answer in that it submitted a letter in response to the Complaint, on or about July 23, to the Secretary of the Commission and to counsel for the Director. The Commission's official file does not contain this letter, but counsel for the Director acknowledges receiving it.¹ Second, Respondent avers that all of the deficiencies underlying the Complaint have been corrected to the satisfaction of the consumer involved. Finally, Respondent asserts that it has meritorious defenses to the Complaint in this case.

The Director opposes the motion to set aside the default. First, the Director argues that the attempted answer of July 23 was insufficient as a matter of law because it was not directed to the Commission, not in the form of an answer, and not in compliance with Commission Rule 4 CSR 240-2.070(8), which requires that an answer contain "[a]ll grounds of defense, both of law and of fact[.]" Second, the Director contends that the corrections made by Respondent, and the consumer's acknowledgment thereof, are insufficient.

The Commission concludes that Respondent has shown good cause such that the order granting default should be set aside. The Director acknowledges that a timely attempt to answer was made. In this circumstance, a default is inappropriate.

The Respondent shall have ten days from the date of this order within which to file its answer or other responsive pleading.

IT IS THEREFORE ORDERED:

1. That the Order Granting Default issued herein on September 18, 2001, is set aside.
2. That Respondent shall file its answer or other responsive pleading no later than the tenth day following the issuance of this order.
3. That this order shall become effective on October 28, 2001.

Murray, Lumpe and Gaw, CC., concur Simmons, Ch., absent

Thompson, Deputy Chief Regulatory Law Judge

¹ Director's Response, at Paragraph 3.

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In the Matter of the Petition of the North American Numbering Plan Administrator, On Behalf of the Missouri Telecommunications Industry, for Approval of NPA Relief Plan for the 314 and 816 Area Codes.*

*Case No. TO-2000-374
Decided October 25, 2001*

Telecommunications §§8, 26, 7. The Commission denies the Office of Public Counsel's Motion for Correction and Clarification finding Public Counsel's position with respect to numbering relief in the 314 and 816 area codes were not appropriate and were abandoned by the Public Counsel.

**ORDER REGARDING IMPLEMENTATION
DATES FOR STATE NUMBER POOLING TRIALS**

Syllabus:

This order grants the Motion for Reconsideration on Behalf of the Telecommunications Industry Regarding the Implementation Dates for State Number Pooling Trials filed by Southwestern Bell Telephone Company on October 5, 2001.¹

Discussion and Decision:

On September 25, 2001, the Commission ordered state number pooling trials in the 314 and 816 NPAs with implementation dates of January 2, 2002, and February 1, 2002, respectively. Bell's motion recommends that the implementation dates be revised to January 22, 2002, and February 22, 2002, respectively.

Bell stated that a state number pooling trial is beginning in the 713 NPA in Houston, Texas, on January 1, 2002, and that Bell and other industry participants must devote employees and resources to that effort also. Bell states that it would be beneficial to the industry to stagger the Missouri trials so that they do not coincide with the Texas trial. Bell also states that for some industry members the Missouri trials present their first experience with number pooling and that allowing additional time would be beneficial for successful implementation. Bell states that there would be no harm from granting the request.

The Commission's Staff filed a response on October 10, 2001. Staff noted that NeuStar had conducted an implementation meeting on October 4, 2001, via teleconference and that these industry concerns were discussed. Staff stated that Bell's motion presents good cause to push back the implementation dates. However, Staff does not anticipate any network disruptions if the motion filed by Bell is denied.

The Commission finds that the implementation dates for the Missouri number pooling trials should be changed as suggested by Bell on behalf of certain industry

*See pages 82, 237, 500 and 503 for other orders in this case.

¹ Bell represented that it filed its motion on behalf of industry participants including Allegiance Telecom, AT&T, NuVox, Spectra, Sprint, WorldCom, XO Communications and itself.

participants. The change in the dates will not prejudice the implementation of this number resource conservation program and will benefit the industry and consumers by promoting a smooth implementation and avoiding expenses associated with attempting a dual implementation with the Texas trial.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone Company’s Motion for Reconsideration on Behalf of the Telecommunications Industry Regarding Implementation Dates for State Number Pooling Trials is granted.
2. That 1,000s block number pooling in the 314 NPA shall be implemented according to the timelines developed in implementation meetings of the participants with a mandated start day of January 22, 2002.
3. That 1,000s block number pooling in the 816 NPA shall be implemented according to the timelines developed at the implementation meetings of the participants with a mandated start day of February 22, 2002.
4. That this order shall become effective on November 4, 2001.

Simmons, Ch., Murray, Lumpe, and Gaw, CC., concur.

Thornburg, Regulatory Law Judge

In the Matter of an Investigation into Public Utility Emergency Preparedness.*

*Case No. OO-2002-202
Decided October 31, 2001*

Evidence, Practice and Procedure §1. Commission established case to facilitate Staff investigation of emergency preparedness and security of facilities by public utilities and to receive Staff’s report.

Evidence, Practice and Procedure §2. Commission established case to facilitate Staff investigation of emergency preparedness and security of facilities by public utilities and to receive Staff’s report.

ORDER ESTABLISHING CASE

On October 23, 2001, the Commission’s Staff filed a motion to establish an investigative case. Staff proposes to survey Missouri utilities concerning their preparedness for disaster and emergency situations including procedures for dealing with terrorist threats or attacks. Staff proposes to report its findings periodically to the Commission and to file a formal report by December 31, 2001. Staff may propose suggestions or recommendations to the Commission based upon information obtained.

*Case was later re-named AO-2002-202.

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The information obtained in a survey and any resulting report and suggestions will inform the Commission and the public as to the steps taken by Missouri utilities to prepare for disaster and emergency situations. The Commission determines that a case should be established to receive information obtained from Staff's survey and resulting report. Thus, the Commission will establish Case No. OO-2002-202.

IT IS THEREFORE ORDERED:

1. That Case No. OO-2002-202 is hereby established for the purpose of surveying Missouri utilities and receiving interim and final reports by the Commission's Staff.
2. That this order shall become effective on October 31, 2001.

Keith Thornburg, Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

**In the Matter of Missouri Natural Gas Distribution Companies'
Application for Recognition of Uncollectibles Expense Under
the Terms of 4 CSR 240-13.055(10).**

*Case No. GO-2002-175
Decided October 30, 2001*

Gas §§17.1, 85. The Commission suspended tariffs filed by Laclede Gas Company, Missouri Gas Energy, a division of Southern Union Company, Atmos Energy Corporation d/b/a United Cities Gas Company and Greeley Gas Company, and Missouri Public Service and St. Joseph Light and Power, divisions of UtiliCorp United Inc. designed to recover a portion of each applicant's uncollectibles expense through its Purchased Gas Adjustment process.

**ORDER SUSPENDING TARIFFS
AND SCHEDULING PREHEARING CONFERENCE**

On October 9, 2001, Laclede Gas Company, Missouri Gas Energy, a division of Southern Union Company, Atmos Energy Corporation d/b/a United Cities Gas Company and Greeley Gas Company, and Missouri Public Service and St. Joseph Light and Power, divisions of UtiliCorp United Inc. (the LDCs) filed a pleading requesting that the Commission approve tariffs designed to recover a portion of each applicant's uncollectibles expense through its Purchased Gas Adjustment (PGA) process, or issue an accounting authority order (AAO), or both. The LDCs state that, because of the operation of the cold weather rule and the cold weather last fall, they are experiencing or will experience high levels of uncollectibles expense, and have no meaningful opportunity to recover them.

On October 19, the Office of the Public Counsel filed a response to the application. Public Counsel recommends that the request for an AAO be denied, and the tariffs suspended. Public Counsel points out that the application does not contain sufficient facts to support granting it, and notes the increased earnings the LDCs experienced from increased gas usage last fall. Public Counsel also points out that the amount of uncollectible expense for which each LDC seeks recovery is unknown. Public Counsel states that the LDCs' proposal violates both the prohibition against retroactive ratemaking and the prohibition against single-issue ratemaking. Public Counsel also states that these expenses are inappropriate for AAO treatment. Public Counsel argues that the Commission should not grant the LDCs' request because the LDCs threaten to cut off more customers if their application is not treated favorably, and recommends re-examining the cold weather rule.¹

The Staff of the Commission also filed a response to the application on October 9, in which it recommends that the AAO be denied and the tariffs rejected. Staff states that recovery of these expenses through the PGA is unlawful, violating both the prohibition against retroactive ratemaking and the prohibition against single-issue ratemaking. Staff points out that the companies' profits improved during the same period their uncollectibles expenses increased. Staff states that adding uncollectibles to the PGA/ACA process will unduly complicate it, and that uncollectibles expense is a poor candidate for AAO treatment. Staff recommends that the Commission re-examine the cold weather rule and proposes a number of changes to be made on an emergency basis.

On October 25, the LDCs filed a response to Public Counsel and Staff. The LDCs express disappointment that Public Counsel and Staff oppose their requests, but are heartened that Staff recognizes the need for action. The LDCs propose, if their application is granted, to reduce the amount of arrearages they will require a customer to pay in order to be reconnected. The LDCs also state that they are willing to discuss some of the features of Staff's emergency rule proposal. The main focus of the LDCs' response is to dispute the claims of Public Counsel and Staff that the Commission cannot lawfully grant the relief the LDCs request. The LDCs argue, in fact, that the reverse is true: that the Commission must grant the relief sought (or something similar) if the Commission makes changes to the Cold Weather Rule.

Public Counsel and Staff raise significant questions about the proposed tariffs and the proposed AAO, both about the lawfulness of the LDCs' proposals and the lack of an evidentiary basis on which the Commission can base a decision. In order to allow sufficient time to study the effect of the proposed tariffs and establish an evidentiary record to determine if they are lawful and in the public interest, the proposed tariffs will be suspended. Because the request for deferral authority was combined with the request for tariff approval, the Commission will consider it at the same time it considers the proposed tariff changes. Although it is suspending the tariffs to allow a thorough examination, the Commission is well aware of the still-

¹ 4 CSR 240-13.055

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lingering effects of the unique events of last fall, and is already actively and expeditiously evaluating the current cold weather rule to determine if changes need to be made.

The Commission will schedule a prehearing conference to afford the parties the opportunity to discuss, define, and possibly resolve the issues presented. The Commission will also set a date for the filing of a proposed procedural schedule to ensure that this case progresses.

IT IS THEREFORE ORDERED:

1. That the proposed tariff sheets submitted on October 9, 2001, by UtiliCorp United Inc., and assigned Tariff No. 200200260, are suspended for a period of 120 days plus six months beyond November 8, 2001, to September 8, 2002, or until otherwise ordered by this Commission. That the proposed tariff sheets submitted on October 9, 2001, by Missouri Gas Energy, a division of Southern Union Company, and assigned Tariff No. 200200265, are suspended for a period of 120 days plus six months beyond November 8, 2001, to September 8, 2002, or until otherwise ordered by this Commission.

2. That the proposed tariff sheets submitted on October 9, 2001, by Laclede Gas Company and assigned Tariff No. 200200266, are suspended for a period of 120 days plus six months beyond November 8, 2001, to September 8, 2002, or until otherwise ordered by this Commission.

3. That the proposed tariff sheets submitted on October 9, 2001, by Atmos Energy Corporation d/b/a Greeley Gas Company and assigned Tariff No. 200200267, are suspended for a period of 120 days plus six months beyond November 8, 2001, to September 8, 2002, or until otherwise ordered by this Commission.

4. That the proposed tariff sheets submitted on October 9, 2001, by Atmos Energy Corporation d/b/a United Cities Gas Company and assigned Tariff No. 200200268, are suspended for a period of 120 days plus six months beyond November 8, 2001, to September 8, 2002, or until otherwise ordered by this Commission.

5. That the proposed tariff sheets submitted on October 9, 2001, by Atmos Energy Corporation and assigned Tariff No. 200200269, are suspended for a period of 120 days plus six months beyond November 8, 2001, to September 8, 2002, or until otherwise ordered by this Commission.

6. That a prehearing conference shall be held on November 7, 2001, at 10:00 A.M. in room 305 of the Governor Office Building, 200 Madison Street, Jefferson City, Missouri, a building that meets accessibility standards of the Americans with Disabilities Act. Any person who needs specific accessibility accommodations may call the Public Service Commission's Hotline at 1-800-392-4211 (voice) or 1-800-829-7541 (TDD) prior to the hearing.

7. That the parties shall file a proposed procedural schedule no later than November 14, 2001. The procedural schedule shall include dates for the filing of testimony and for a hearing.

8. That this order shall become effective on November 9, 2001.

Simmons Ch., Lumpe, and Gaw, CC., concur.
Murray, C., dissents, with dissenting opinion attached.

Mills, Deputy Chief Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

The tariffs and accounting authority order (AAO) proposed by the local distribution companies (LDCs) were designed to address the extraordinarily high level of uncollectibles resulting from compliance with the Cold Weather Rule (4 CSR 240-13.055) during the months of November and December, 2000. The LDCs, in their application, state that they are currently experiencing or will experience extraordinarily high levels of uncollectibles expense that significantly exceed operating expense levels included in each of the respective company's revenue requirement used by the Commission for rate setting purposes.

It is well known that the 2000-2001 winter was marked by record-cold temperatures and nationwide increases in wholesale natural gas prices that were higher than at any previous time in this country. The Missouri LDCs are understandably concerned about the high levels of uncollectibles that exist as a result of their compliance with the Cold Weather Rule during that time. They are also understandably concerned about their ability to restore service to their most vulnerable customers before the onset of the 2001-2002 winter heating season and to minimize additional disconnections, without further financial hardship to the LDCs.

The LDCs have proposed two measures to address both of those concerns without creating additional burdens on non-delinquent ratepayers during the 2001-2002 winter season. The proposal appears to be a reasonable approach to implement the provision of the Cold Weather Rule that requires recognition and recovery of reasonable operating expenses incurred by a utility as a result of the rule.

The tariffs simply provide that the PGA/ACA process will be modified to allow reconciliation of gas costs to the revenues actually collected rather than the revenues billed. I can think of no logical argument that would distinguish between the legality of billed versus collected revenues as a basis for such reconciliation. Each reconciliation will be subject to the usual prudence review of the ACA process.

Furthermore, the tariffs are limited to the 2001-2002 ACA period, and are designed simply to respond to the unusually high gas-cost portion of uncollectibles resulting from the circumstances of the 2000-2001 winter. The LDCs are attempting, through these tariffs, to alleviate some of the financial hardship of their compliance with the provisions of the Commission's Cold Weather Rule. The companies have, in fact, as the application points out, gone beyond those requirements in working with customers to minimize any hardships to the customers. The companies are entitled to recovery of the expenses incurred as a result of the Cold Weather Rule. Therefore, I find the companies' proposed tariffs to be a lawful and reasonable method to recover a portion of those expenses and would approve the tariffs without suspension.

The companies also seek deferral of the non-gas portion of the uncollectibles through an AAO. The Commission could determine, without an evidentiary hearing, that the non-gas cost portion of the uncollectibles at issue constitutes an extraordinary expense that qualifies for deferral. All other issues would remain for consideration in each respective rate case, including the amount of recovery, if any, and whether there should be any offsets to recovery. The Commission could grant the AAO with a reasonable time limitation to ensure that the deferrals are not allowed to continue indefinitely.

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Because there is, however, a question of whether non-gas uncollectible expenses beyond the level built into rates are normal ongoing expense items and therefore not appropriate for AAO deferral, as the Public Counsel suggests, I would schedule a hearing at the earliest possible time. Since the Commission has the authority to proceed without an evidentiary hearing, I would limit the hearing to a brief examination of whether uncollectibles significantly in excess of the allowance included in rates meet the standard for deferral. I would oppose any delay in setting the hearing and issuing a Commission decision.

For these reasons, I dissent from today's order.

In the Matter of Osage Water Company's Request for a Rate Increase for Water Service Pursuant to the Public Service Commission's Small Company Rate Increase Procedure.*

*Case No. WR-2000-557
Decided November 6, 2001*

Water §§16, 31. The Commission found that Osage Water Company began charging its customers higher rates before it was authorized to do so and ordered Osage to lower its rates to the previously-authorized level for a period of time in order to make customers whole for the unlawful overcharges.

ORDER DIRECTING TEMPORARY REDUCTION

In this order, the Commission finds that Osage Water Company began charging its customer higher rates before it was authorized to do so. The Commission orders Osage to lower its rates to the previously-authorized level for a period of time in order to make customers whole for the unlawful overcharges.

On March 29, 2001, the Commission issued a Report and Order authorizing Osage to file revised tariffs to implement a rate increase. On May 21, the Commission directed its Staff to report on the status of the tariff filing. On May 25, Staff reported that Osage had filed proposed tariffs to implement the authorized rate increase, but that those tariffs had been rejected by the Commission. On July 13, Osage re-filed the tariffs intended to comply with the March 29 Report and Order.

On July 20, Staff filed a recommendation in which it recommended that the Commission approve Osage's tariff. Staff stated that the tariff complies with the Commission's Report and Order. Staff also stated that good cause exists to approve the tariff on less than 30 days' notice because so much time has elapsed since the rate increase was authorized.

*See pages 213 and 557 for other orders in this case.

On July 23, the Office of the Public Counsel filed a response to the Staff recommendation. Public Counsel stated that it was concerned about the possibility that Osage had been charging amounts higher than authorized by its then-effective tariffs. Although it approved the tariffs for service on and after July 26, the Commission ordered its Staff to investigate whether Osage had been charging the higher rates before its tariffs were approved.

On September 24, the Staff filed a report on its investigation in which it concluded that Osage had, in fact, been charging the higher rates since May 1, 86 days before its tariffs were approved. Osage did not file a response to the Staff report, and the Commission accepts the report's conclusion, and finds that Osage overcharged its customers for a period of 86 days.

The Commission will not allow Osage to retain the benefits of its illegal overcharges. The Commission will not direct its General Counsel to seek penalties pursuant to Section 386.570, RSMo 2000, but will require Osage to reduce its rates to the previously-authorized level until it has foregone revenues equal to the amount of the unlawfully collected overcharges. This temporary reduction will make customers whole for the overcharges between May 1 and July 26. The Commission will order Osage to file new tariffs to reduce its rates to the previously-authorized level, and will allow Osage to file tariffs to once again raise its rates upon a showing that it has foregone revenues equal to the amount of the unlawfully collected overcharges.

IT IS THEREFORE ORDERED:

1. That, no later than November 20, 2001, Osage Water Company shall file a revised Sheet No. 5 that reduces rates to the level authorized before the March 29, 2001 Report and Order. The tariff must bear an issue date no earlier than the date of filing, and must bear an effective date no less than 30 days after the issue date.
2. That upon a showing that it has foregone revenues equal to the amount of the unlawfully collected overcharges, Osage Water Company may file a revised Sheet No. 5 that once again raises rates to the level authorized in the March 29, 2001 Report and Order.
3. That this order shall become effective on November 16, 2001.

Murray, Lumpe and Gaw, CC., concur Simmons, Ch., absent

Mills, Deputy Chief Regulatory Law Judge

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In the Matter of Osage Water Company's Request for a Rate Increase for Water Service Pursuant to the Public Service Commission's Small Company Rate Increase Procedure.*

Case No. WR-2000-557
Decided November 20, 2001

Water §§16, 31. Osage Water Company filed a motion asking the Commission to modify its November 6 order to allow Osage to calculate the amount of overcharge for each water customer for the months of May, June, and July of 2001, and to credit each account for the overcharge during the months of December 2001, January 2002, and February 2002. The Commission agreed that Osage's proposed method of making customers whole would be more workable than the method the Commission ordered, and allowed Osage to use it.

ORDER MODIFYING METHOD OF TEMPORARY REDUCTION

In an order issued November 6, 2001, the Commission found that Osage Water Company began charging its customer higher rates before it was authorized to do so and ordered Osage to lower its rates to the previously-authorized level for a period of time in order to make customers whole for the unlawful overcharges.

On November 15, Osage filed a motion asking the Commission to modify the November 6 order to allow Osage to calculate the amount of overcharge for each water customer for the months of May, June, and July of 2001, and to credit each account for the overcharge during the months of December 2001, January 2002, and February 2002.

Osage stated that crediting each customer's account will be more workable than the method the Commission ordered. Osage has added a substantial number of customers since July 26, and has a large number of large commercial customers whose actual water usage and water bill varies significantly from month to month, so an overall reduction in Osage's water tariff rate would benefit customers who were not charged between May 1 and July 26, and would result in an apportionment of the rate reduction on a different basis than the overcharge due to variations in water usage.

On November 19, the Staff of the Commission filed a response to Osage's motion to modify the reduction. Staff states that the reduction should apply to all customers that were connected before July 26. The Commission agrees; this does not appear inconsistent with Osage's proposal. Staff states that a potential problem with the proposed method may be that some customers who were connected during the period of overcharges may no longer be customers of the company, and may be difficult to locate. Staff also notes as another possible problem that three months may not be long enough to credit a customer's account for the overcharges. Staff states that these two possible problems can be dealt with

*See pages 213 and 555 for other orders in this case.

prospectively, and should not keep the Commission from approving Osage's proposal. In order to assess whether and to what extent these two potential problems will have interfered with the refunds, the Commission will direct Staff to file a report after the proposed refund period has ended.

The Commission agrees that Osage's proposed method of making customers whole will be more workable than the method the Commission ordered, and will allow Osage to use it.

IT IS THEREFORE ORDERED:

1. That the order issued by the Commission on November 6, 2001, is modified.
2. That Osage Water Company shall calculate the dollar amount of overcharge for each water customer that was connected before July 26, 2001, for the months of May, June, and July of 2001, and credit each account for the overcharge during the months of December 2001, January 2002, and February 2002.
3. That Osage Water Company shall file a report by December 14, 2001, showing the total dollar amount of overcharges and how it was calculated. The report shall also state the total dollar amount of overcharges to customers who are no longer customers of Osage Water Company and how that number was calculated. The report shall set forth the manner in which the company will attempt to locate and reimburse those former customers who were overcharged. The report shall also propose the manner in which the company will allocate to existing customers the credits due former customers who cannot be located.
4. That Osage Water Company shall file, by December 14, 2001, a copy of the customer notice that will appear in each customer's bill explaining the credit, and whether interest is being applied.
5. That Osage Water Company shall file, by April 1, 2002, an affidavit stating the total dollar amount of overcharges credited or refunded.
6. That the Staff of the Commission shall file a report on May 1, 2002, on the status of the credits.
7. That this order shall become effective on November 30, 2001.

Murray, Lumpe and Gaw, CC., concur Simmons, Ch., absent

Mills, Deputy Chief Regulatory Law Judge

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In the Matter of a Proposed Emergency Amendment to Commission Rule 4 CSR 240-13.055.*

*Case No. AX-2002-203**Decided November 6, 2001*

Gas §33. The Commission found an emergency amendment to the Cold Weather Rule was necessary because an extraordinary number of households were without gas service or in danger of losing service, and the average amount of arrearage was also extraordinarily high.

ORDER FINDING NECESSITY FOR RULEMAKING

On October 24, 2001, the Staff of the Missouri Public Service Commission filed a Motion for Finding of Necessity for Rulemaking with an Issues Paper and a draft rule attached. Staff proposes that the Commission promulgate an emergency amendment to the Cold Weather Rule (4 CSR 240-13.055). On October 31, the Commission convened a hearing at which members of the public, representatives of the Office of the Public Counsel, representatives of Staff, and representatives of all Missouri regulated natural gas local distribution companies were present and offered the opportunity to present testimony.

Based on the sworn testimony at the hearing, the Commission finds as follows:

There is an unusually high number of residential customers who are currently without natural gas service. There are at least 29,000 Missouri residential households without gas service, and perhaps as many as 40,000 to 50,000. The cause of so many customers being without gas service is the combination of extremely high gas prices in combination with extremely cold weather in November and December of 2000. This combination was an extraordinary event. As a result, not only are an extraordinary number of households without gas service or in danger of losing service, but the average amount of arrearage is also extraordinarily high. As of August 2001, there was a 37 percent increase in the number of disconnects for Missouri LDCs as a group, and the amount owed increased by 117 percent. The situations facing some of these consumers could be health-threatening and life-threatening. There was testimony that the rate of fires goes up as a result of people having gas service disconnected, and a complete picture of the results of gas service disconnects should take frostbite, hypothermia and fire deaths into account. In fact, some events – such as a failure of an elderly person choosing to pay the gas bill instead of buying and taking medicine – might not even be recognized as a disconnection-of-service event. To make matters, even more dire, the average LIHEAP grant has been lowered from \$235 last year to \$185 this year.

The local distribution companies agree that special measures need to be taken for this winter, that balances customers are carrying are significantly higher than

*The Commission, in an order issued on November 20, 2001, denied an application for rehearing in this case. On November 20, 2001, this case was appealed to Cole County Circuit Court (01CV325865).

they have been in the past, and that more customers are disconnected. Laclede Gas Company had almost double the number of customers disconnected over the period of April through October 2001 compared to a comparable period last year (17,900 versus 9,000). Those customers owed approximately \$10 million compared to the \$4 million owed by disconnected customers last year. Missouri Gas Energy, a division of Southern Union Company, had approximately 30 percent more customers disconnected at the end of October 2001 compared to October 2000. The average arrearage for those customers currently disconnected is \$871 compared to \$411 last year.

Pursuant to Section 536.016, RSMo 2000, a state agency is required to find, based upon substantial evidence on the record, that a proposed rule is necessary to carry out the purposes of the statute that granted the rulemaking authority. Based on the testimony at the hearing, the Commission finds that an amendment to the Cold Weather Rule (4 CSR 240-13.055) is necessary to carry out the purposes of Section 386.210 *et seq.* and Section 393.110 *et seq.*, RSMo 2000.

IT IS THEREFORE ORDERED:

1. That the Staff of the Missouri Public Service Commission is directed to proceed with the necessary procedures of the Commission and applicable procedures of administrative rulemaking toward the end of the Commission promulgating an emergency amendment to the Cold Weather Rule (4 CSR 240-13.055).
2. That this order shall become effective on November 6, 2001.

Murray, Lumpe and Gaw, CC., concur Simmons, Ch., absent

Mills, Deputy Chief Regulatory Law Judge

Joint Application of Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC, for Approval of the Transfer of Stock in Claricom Holdings, Inc. to Stacom Holdings, Inc.

*Case No. TM-2001-669
Decided November 15, 2001*

Telecommunications §4. The Commission approved the transfer of all of the stock in Claricom Networks, Inc., a Delaware based telecommunications company doing business in the state of Missouri, and regulated by the Commission. The purchasers were Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC, who are all Delaware corporations, but are not telecommunications companies, are not regulated by the Commission, and do not do business in the state of Missouri. The Commission concludes that it is in the public interest to approve the transfer and because applicants requested the Commission's approval.

ORDER GRANTING MOTION TO APPROVE TRANSFER OF STOCK

This order grants the application to approve a transfer of stock.

The Companies

Claricom Networks, Inc. is a Delaware based telecommunications company regulated by the Commission. Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC, are all Delaware corporations, but are not telecommunications companies, are not regulated by the Commission, and do not do business in the state of Missouri. Claricom Holdings, Inc. owns 100% of the capital stock of Claricom Networks, Inc., and Staples, Inc. owns 100% of the capital stock of Claricom Holdings, Inc. Claricom Holdings, Inc. is selling all of its stock in Claricom Networks, Inc. to Stacom Holdings, LLC. Platinum Equity, LLC, is the parent company of Stacom Holdings, Inc.

Staff's Pleadings

On July 3, 2001, the Staff of the Missouri Public Service Commission filed its motion to dismiss the applicants' motion to approve the transfer of stock.

On August 30, 2001, the Commission issued an order directing its Staff to identify the specific facts of this case that it relies upon and, in particular, how the status of the regulated telecommunications company is affected by the proposed transaction. The order required that Staff's arguments should show how Staff applies the jurisdictional statute(s) it relies upon and should not present mere recitals or bare conclusions. Because the applicants did not object to the Commission's jurisdiction, the order also required Staff to provide an explanation of the legal harm or the expense, burden, or other detriment if the Commission accepts jurisdiction over the matter presented. Finally, the Commission directed its Staff to file its recommendation regarding the merger in the event the Commission assumes jurisdiction.

On October 1, 2001, Staff filed its response to the Commission's order. Briefly restated, Staff's pleadings contained the following major points:

1. On June 7, 2001, Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC, filed an application with the Commission to transfer stock.
2. The application states that Claricom Holdings, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC, entered into a purchase and sale agreement for the transfer of stock.
3. The application states that approval of the stock transfer is sought under the provisions of Section 392.300, RSMo 2000,¹ which contains two subsections:

¹References to Sections of the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of the year 2000.

Subsection 1 requires that any telecommunications company regulated by the Commission receive permission from the Commission for any merger or consolidation and says:

No telecommunications company shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such line or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.

Subsection 2 gives the following jurisdictional statement:

Except where stock shall be transferred or held for the purpose of collateral security, no stock corporation, domestic or foreign, other than a telecommunications company, shall, without the consent of the commission, purchase or acquire, take or hold more than ten percent of the total capital stock issued by any telecommunications company organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any telecommunications company may, without the consent of the commission, acquire and hold the remainder of the capital stock of such telecommunications company, or any portion thereof.

4. Section 392.300.1 does not apply to this transaction because Stacom Holdings, Inc. is buying the stock of Claricom Networks, Inc. Stacom Holdings, Inc. is not acquiring "the franchise, facilities or system" of Claricom Networks, Inc. as is required under the statute to create Commission jurisdiction. In addition, Stacom Holdings, Inc. is not "merging or consolidating" Claricom Network, Inc.'s "franchise, line or system with any other corporation, person or public utility" as required by the jurisdictional language of the statute.

5. In the *Union Pacific* case,² with respect to Section 392.300.2, the Commission sought to enjoin Union Pacific, a Utah corporation, from issuing bonds without first applying to

² *Public Service Commission v. Union Pacific Railroad Company*, 197 S.W. 39 (Mo. banc 1917).

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it for authority. In ruling against the Commission, the Court explained that the words “organized and existing or hereafter incorporated, under or by virtue of the laws of the state of Missouri” in the Public Service Commission Act, applied to domestic corporations and not to foreign corporations.

6. Section 392.300.2 does not apply to this transaction because Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, Inc., and Platinum Equity, LLC, are not “organized or existing under or by virtue of the laws of this state.” All five companies are organized and existing under the laws of Delaware. Accordingly, this sale of stock does not involve the acquisition of ownership of companies organized and existing under the laws of Missouri.

7. The Commission issued an order dismissing a stock transfer application for lack of jurisdiction under similar facts on October 19, 1999, in case number TM-2000-146.

Thus, the Staff requested that the Commission order that Section 392.300 does not grant the Commission jurisdiction over this transaction, and dismiss the application.

Public Counsel’s Suggestions in Support of Commission Jurisdiction

On October 10, 2001, the Office of the Public Counsel filed its suggestions in support of the Commission taking jurisdiction in this case. Briefly restated, the pleading contained the following major points:

1. Section 386.250 gives the Commission jurisdiction over all telecommunications facilities, telecommunication services, and telecommunications companies.
2. Section 386.320.1 gives the Commission general supervision over all telephone corporations and telephone lines and the manner in which their lines and property are owned, leased, controlled, or operated.
3. Holding companies that acquire control of telecommunications companies that do business in Missouri under a certificate issued by the Commission should not be able to structure the corporate form of ownership in such a way as to defeat the Commission’s jurisdiction.
4. Stock issuance is not the issue in this transaction. It is a transfer of stock ownership which assigns the control and operation of a telecommunications company operating in

Missouri to another corporate entity. Commission oversight is designed to provide scrutiny over telecommunications companies for the purpose of providing reasonable rates, security of the availability, and the quality of services. The transfer of ownership and control of a telecommunications company operating in Missouri presents a potential for abuses that could be adverse to the public interest.

Findings of Fact

The Commission finds that Claricom Networks, Inc. is a Delaware based telecommunications company doing business in the state of Missouri, regulated by the Commission, and the stock in this proposed transaction is 100% of the shares issued by that company.

The Commission finds that Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC, are all Delaware corporations, but are not telecommunications companies, are not regulated by the Commission, and do not do business in the state of Missouri.

Conclusions of Law

The *Deffenderfer* case held that the requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.³ Since no one has requested a hearing, the Commission may grant the relief requested based on the application.

The Commission concludes that because it is in the public interest to approve this transfer and because applicants requested the Commission's approval, it is not necessary to fully resolve the issue of jurisdiction raised by Staff.

The Commission's authority to review the sale of stock assesses whether the sale or transfer is in the best interest of the public in Missouri. The Commission's authority is granted so that the Commission may intercede when the public interest is in peril. Such peril can only exist if a corporation is actually doing business in Missouri. It is possible that the statute could be interpreted as Staff argues if one ignores the public policy under which the Commission acts. As such, it may be appropriate for the Missouri General Assembly to examine a clarification of Section 392.300.

Regardless, the applicants initially requested the Commission to approve the transaction and the Commission concludes that it is not detrimental to the public interest to do so.

Decision

Therefore, the Commission will approve the proposed transaction, which renders Staff's motion to dismiss moot.

³ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

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Additional Question

There is an additional question about Claricom Network, Inc.'s proposed change of its legal structure. Paragraph 5 of the joint application for approval of transfer of stock states, in part: "Pursuant to the [Purchase and Sale] Agreement, Claricom will be converted to a limited liability company and all of the outstanding stock in Claricom will be transferred from Seller to Buyer."

The Commission will require its Staff to file a report stating whether Claricom Networks, Inc.'s proposed conversion to a limited liability company triggers any required action by the Commission and, if so, what that action is.

IT IS THEREFORE ORDERED:

1. That the application to transfer stock filed on June 7, 2001, by Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC, is approved.

2. That the Staff of the Missouri Public Service Commission must file a report concerning Claricom Networks, Inc.'s proposed conversion to a limited liability company as set forth above, no later than November 26, 2001.

3. That Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC, must report to the Missouri Public Service Commission that they have accomplished the transaction approved in this order no later than ten days after it has been accomplished.

4. That this order will become effective on November 25, 2001.

Lumpe and Gaw, CC., concur

Murray, C., dissents with Dissenting

Opinion attached

Simmons, Ch., absent

Hopkins, Senior Regulatory Law Judge

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

While I agree that the Missouri General Assembly may need to examine Section 392.300 RSMo for possible clarification, I cannot agree that Staff's interpretation of the Commission's jurisdiction is incorrect. The Staff has merely provided the Commission with the interpretation of the meaning of Section 392.300.2 RSMo that was found by the court in the Union Pacific Railroad Company case in 1917.¹ That interpretation has been consistently followed by this Commission in determining the issue of jurisdiction.

It is appropriate for the Commission to dismiss this matter for lack of jurisdiction and seek a statutory change that does not prevent Commission oversight of corporations doing business in the State, merely because they are incorporated elsewhere.

Therefore, I respectfully dissent from this Order.

¹ *Public Service Commission v. Union Pacific Railroad Company*, 197 S.W. 39 (Mo. banc 1917).

In the Matter of the Filing of Proposed Tariffs by The Empire District Electric Company to Comply with the Commission's Report and Order in Case No. ER-2001-299 and to Correct a Recently Discovered Error in the Calculation of The Revenue Requirement.*

*Case No. ET-2002-210
Decided November 19, 2001*

Electric §1. The Commission rejected proposed tariff sheets that were designed to raise the company's current rates by \$3,562,983 on an annual basis. The company filed the proposed tariffs in order to correct an error in the data used in the company's recently decided rate case, ER-2001-299. The company had not filed a request for rehearing in that rate case. The Commission determined that the Report and Order in the rate case was final and not appealable. The Commission also found that the rates in the company's current tariff were lawful and reasonable and should continue in force.

Electric §20. The Commission rejected proposed tariff sheets that were designed to raise the company's current rates by \$3,562,983 on an annual basis in order to correct an error in the data used in the company's recently decided rate case, ER-2001-299. The Commission determined that the the rates in the company's current tariff were lawful and reasonable and should continue in force.

ORDER REJECTING TARIFF

On October 26, 2001, The Empire District Electric Company filed proposed tariff sheets, Tariff File No. 200200321, bearing an effective date of November 25, 2001. The Company also requested expeditious approval. The tariff sheets are designed to raise the Company's current rates by \$3,562,983 on an annual basis. Empire indicates that the tariff's purpose is to "correct a recently discovered error in the calculations relied upon by all parties and the Commission in determining the revenue requirement in Case No. ER-2001-299." Case No. ER-2001-299 is Empire's recently decided rate case.¹ Empire states that in the rate case, an error occurred in early August 2001, when the Staff of the Missouri Public Service Commission transferred data to create an "EMS" computer run and entered revenues from off-system sales but neglected to enter the corresponding costs from those sales. Empire contends that the result of this error was an unintentional understatement of Empire's test period expenses, which reduced the revenue requirement shown by the EMS run. Empire states that as a result of this error, the figures regarding the alleged revenue requirement in ER-2001-299 were incorrect.

* The Commission, in an order issued on January 22, 2002, denied an application for rehearing in this case.

See page 463 for the Commission's order in Case No. ER-2001-299.

¹ The Commission issued a Report and Order in Case No. ER-2001-299 on September 20, 2001. On September 26, 2001, the Company filed its proposed tariffs in compliance with the Report and Order. The Staff filed its memorandum on September 26, 2001, indicating that the tariff sheets were in compliance with the Report and Order and recommending approval. The Commission issued an order approving the tariff sheets on September 28, 2001.

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Empire indicates that at its request, Staff recalculated the August 7, 2001, EMS run with the appropriate cost data entered and that the revised EMS run indicates that the Company's annual revenue requirement should have been \$3,562,983 more than was reflected in the tariffs approved by the Commission on September 28, 2001, in Case No. ER-2001-299.

Empire contends that this error is "essentially a clerical error." Empire argues that in fairness and equity, the Commission should correct the error and approve the proposed tariffs.

On November 2, 2001, Staff, the Office of the Public Counsel, and Praxair, Inc., filed responses. These parties do not dispute that an error occurred, but Staff and Public Counsel disagree with Empire's proposed remedy (the proposed tariff filing), and Praxair also indicates that it has concerns about the proposed remedy.

Public Counsel argues that the tariff is an unlawful collateral attack on the Commission's decision in Case No. ER-2001-299. In addition, Public Counsel contends that the tariff is an invitation to the Commission to commit unlawful single-issue ratemaking. Staff expresses similar concerns, and recommends that the Commission suspend the tariff sheets and schedule the matter for oral arguments and/or hearing. Praxair addresses several aspects of the tariff that it too finds "troubling."

On November 7, 2001, Empire filed a response countering the objections and offering an alternative proposal as follows: If the Commission will issue an order allowing the proposed tariffs to take effect (authorizing a revenue increase of \$3,562,983), Empire will submit additional proposed tariff sheets to reduce the amount of the annual revenues to be collected pursuant to the Interim Energy Charge by the same amount (\$3,562,983). The Commission issued an order on November 8, 2001, directing that responses to this alternative proposal were due by November 14, 2001.

Staff, Public Counsel, and Praxair filed responses to Empire's alternative proposal on November 14, 2001. Staff and Public Counsel still object to the proposed tariff for the same reasons they previously noted. Praxair states that if it is possible to move beyond the concerns it had originally raised, that Empire's alternative proposal may merit exploration and further discussion.

The Commission has reviewed the proposed tariff along with the official case file, and finds that the tariff should be rejected. Section 386.500, RSMo, provides that an application for rehearing shall be made before the effective date of the order or decision. The effective date of the Commission's Report and Order in ER-2001-299 was October 2, 2001. Empire did not file an application for rehearing and that order is now final and may not be appealed. Empire failed to raise its concerns in a timely manner in order to be considered an adjustment or correction to the final decision of the rate case, ER-2001-299. Collateral attacks of that Report and Order are unlawful. Section 386.270, RSMo 2000, states as follows:

All orders prima facie lawful and reasonable.—All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commis-

sion shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Therefore, the rates found in the current tariff are lawful and reasonable and should continue in force.

Approving the proposed tariff would violate the requirement that the Commission must address all relevant factors in the context of a new general rate increase filing. See *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979). The error here is more than a clerical error. The actual data used by the Commission to make its decision regarding the appropriate revenue requirement was flawed. Nonetheless, it would be inappropriate to now go back and change the figures and calculations.

And although Staff made the error, Empire is not without some culpability. Empire should have discovered the error more quickly; the EMS run occurred August 7, 2001, but Empire did not realize the error until after the Report and Order and the compliant tariff sheets were effective. At this point the mistake is unfortunate but immaterial, and the rates in force should continue to be in force.

Because it violates the prohibition against single-issue ratemaking, the Commission is without authority to approve Empire's tariff. Suspension of the tariff for further consideration would be pointless. For that reason, the tariff submitted by Empire will be rejected.

IT IS THEREFORE ORDERED:

1. That the tariff sheets submitted by The Empire District Electric Company on October 26, 2001 (Tariff File No. 200200321), with an effective date of November 25, 2001, are rejected. The tariff sheets rejected are:

P.S.C. Mo. No. 5

Section 1:

11th Revised Sheet No. 1, Canceling 10th Revised Sheet No. 1

Section 2:

10th Revised Sheet No. 1, Canceling 9th Revised Sheet No. 1

10th Revised Sheet No. 2, Canceling 9th Revised Sheet No. 2

10th Revised Sheet No. 3, Canceling 9th Revised Sheet No. 3

11th Revised Sheet No. 4, Canceling 10th Revised Sheet No. 4

10th Revised Sheet No. 5, Canceling 9th Revised Sheet No. 5

10th Revised Sheet No. 6, Canceling 9th Revised Sheet No. 6

10th Revised Sheet No. 7, Canceling 9th Revised Sheet No. 7

6th Revised Sheet No. 9, Canceling 5th Revised Sheet No. 9

5th Revised Sheet No. 13, Canceling 4th Revised Sheet No. 13

Section 3:

11th Revised Sheet No. 1, Canceling 10th Revised Sheet No. 1

15th Revised Sheet No. 2, Canceling 14th Revised Sheet No. 2

10th Revised Sheet No. 3, Canceling 9th Revised Sheet No. 3

10th Revised Sheet No. 4, Canceling 9th Revised Sheet No. 4

2. That this order shall become effective on November 24, 2001.

Vicky Ruth, Senior Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

In the Matter of the Application of Southwestern Bell Communications Services, Inc., d/b/a SBC Long Distance, for a Certificate of Service Authority to Provide Interexchange Telecommunications Services within the State of Missouri.

In the Matter of the Application of Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, for a Certificate of Service Authority to Provide Interexchange Telecommunications Services within the State of Missouri.

*Case Nos. TA-2001-475 & TA-99-47
Decided November 27, 2001*

Certificates § 21. The Commission granted a certificate of service authority to provide intrastate interexchange telecommunications services in the state of Missouri to Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance and Southwestern Bell Communications Services Inc., d/b/a SBC Long Distance.

Certificates § 46.2. The Commission granted a certificate of service authority to provide intrastate interexchange telecommunications services in the state of Missouri to Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance and Southwestern Bell Communications Services Inc. d/b/a SBC Long Distance.

Telecommunications § 3.2. The Commission granted a certificate of service authority to provide intrastate interexchange telecommunications services in the state of Missouri to Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance and Southwestern Bell Communications Services Inc. d/b/a SBC Long Distance.

Telecommunications § 40. The Commission found that all the interexchange services of Southwestern Bell Communications Services, Inc. were competitive.

Telecommunications § 43. The Commission found that the waivers that Southwestern Bell Communications Services, Inc. requested were identical to those waivers historically granted to competitive carriers by the Commission. Therefore, the Commission found that it was grant the waivers to Southwestern Bell Communications Services, Inc.

APPEARANCES

James M. Fischer, and Larry W. Dority, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Southwestern Bell Communications Services, Inc., d/b/a SBC Long Distance and d/b/a Southwestern Bell Long Distance.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Nathan Williams, Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Senior Regulatory Law Judge.

REPORT AND ORDER

This order grants Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance and Southwestern Bell Communications Services Inc., d/b/a SBC Long Distance certificates of service authority to provide intrastate interexchange telecommunications services in the state of Missouri.

Procedural History

A. Case No. TA-99-47

Southwestern Bell Communications Services, Inc. ("SBCS") d/b/a Southwestern Bell Long Distance filed a verified application with the Missouri Public Service Commission (Commission) on August 4, 1998, pursuant to Sections 392.430 and 392.440, RSMo, for a certificate of service authority to provide intrastate interexchange telecommunications services in Missouri, conditioned on federal authority to provide in-region interLATA services. SBCS asked the Commission to classify it as a competitive company and waive certain statutes and rules as authorized by Sections 392.361 and 392.420, RSMo. The Commission issued a Notice of Applications for Intrastate Certificates of Service Authority and Opportunity to Intervene on August 11, 1998, directing parties wishing to intervene to file their requests by August 26, 1998. Applications to intervene were filed by the Mid-Missouri Group¹ (later referred to as Missouri Independent Telephone Group or MITG), Sprint Communications Company, L.P. (Sprint), MCI Telecommunications Corporation (later referred to as WorldCom), McLeodUSA Telecommunications Services, Inc. (McLeod), AT&T Communications of the Southwest, Inc. (AT&T), Small Telephone Company Group² (STCG), COMPTEL Mo, and Digital Teleport, Inc. Fidelity Telephone Company also filed an Application to Participate without

¹ The MITG group consists of Alma, Chariton Valley, Choctaw, Mid-Missouri, MoKan Dial, Modern, and Northeast Missouri Telephone Companies.

² BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Peace Valley Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc. and Stoutland Telephone Company.

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Intervention. On September 1, 1998, the Commission granted the various applications to intervene or participate without intervention and scheduled an early prehearing conference.

On November 30, 1998, the Staff of the Missouri Public Service Commission filed a Motion to Establish Procedural Schedule, stating that all parties supported its proposed procedural schedule with the exception of the Office of the Public Counsel, who opposed it. On December 1, 1998, Public Counsel filed a Motion to Stay Proceeding, or in the Alternative, Motion to Dismiss.

In its motion, Public Counsel stated that Section 271 of the Telecommunications Act of 1996 prohibits SBCS from providing interLATA telecommunications service until the Federal Communications Commission (FCC) has approved an application for in-region interLATA service by Southwestern Bell Telephone Company (SWBT) or its affiliates. Public Counsel argued that the Commission had no jurisdiction to approve SBCS's interexchange application because, even if approved, SBCS will not be able to provide service until after the FCC has approved the Section 271 application. Public Counsel further argued that, on November 18, 1998, in Case No. TO-99-227, SWBT and SBCS filed a notice with the Commission indicating their intent to file a Section 271 application with the FCC. Public Counsel requested that the Commission stay Case No. TA-99-47 until the FCC had taken final action on the Section 271 application. In the alternative, Public Counsel requested that the case be dismissed for lack of jurisdiction. SBCS did not object to delaying the interexchange application process until after the Commission had concluded the hearings in Case No. TO-99-227.

On January 12, 1999, the Commission issued its Order Granting Motion to Stay, determining that Case No. TA-99-47 should be stayed until the Commission made its recommendation to the FCC, or unless otherwise ordered. On March 6, 2001, the Commission issued its Order Finding Compliance with Section 271 of the Telecommunications Act of 1996, which found that SWBT had complied with Section 271 of the Telecommunications Act, and that it was in the public interest to allow SWBT to enter the interLATA interexchange market (March 6 Order). As explained *infra*, on March 15, 2001, the Commission issued its Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A) in Case No. TO-99-227 (Section 271 Order) that further elaborated upon its findings and conclusions in Case No. TO-99-227. On March 7, 2001, SBCS filed a verified First Amended Application in this proceeding, accompanied by proposed tariffs bearing a forty-five day effective date in conformance with Commission Rules.

B. Case No. TO-99-227

Since the procedural history of Case No. TO-99-227 is directly related to this proceeding, and it is important and relevant to a complete understanding of the procedural history of this proceeding, a brief summary of the procedural history of Case No. TO-99-227 will be discussed.

On November 20, 1998, SWBT notified the Commission of its intent to file with the FCC its application for authority to provide interLATA telecommunications services in Missouri under Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

(the Act). Section 271(d)(2)(B) of the Act provides that the FCC shall consult with the appropriate state commission before ruling on the application of any Bell operating company (BOC) to provide in-region, interLATA service.³ In preparation for fulfilling its role under the federal statute, the Commission held evidentiary proceedings and received testimony and other evidence to determine if SWBT had complied with the requirements of the Act.

After extensive hearings and comments, the Commission found and concluded that SWBT had satisfied the requirements of 47 U.S.C. § 271(c) for authority to provide interLATA services in Missouri and that SWBT's entry into the interLATA long-distance market in Missouri is in the public interest. On March 6, 2001, the Commission issued its Order Finding Compliance With Section 271 of the Telecommunications Act of 1996. ("March 6, Order") The Commission specifically found:

After extensive hearings and comments, the Commission finds that SWBT's application and the M2A as finally revised on February 28, 2001, satisfies the requirements of 47 U.S.C. § 271(c) for authority to provide interLATA services in Missouri. Further, the Commission finds that SWBT's entry into the interLATA long-distance market in Missouri is in the public interest, provided that the M2A is made available to Missouri competitive local exchange carriers.

(March 6, Order, p. 5)

Based on the extensive record in Case No. TO-99-227, the Commission stated that it supported SWBT's application to enter the interLATA interexchange market.⁴ In its Section 271 Order, the Commission also made, *inter alia*, the following findings of fact:

The Act does not require this Commission to make a recommendation to the FCC on the public interest consequences of SWBT's interLATA entry. See 47 U.S.C. § 271(d)(2)(B). Yet this Commission is uniquely situated to evaluate the probable effects of SWBT's potential entry into the interLATA market in Missouri. Having carefully considered the arguments on both sides of this issue, this Commission has concluded that a recommendation to the FCC is appropriate and that SWBT's interLATA entry would serve the public interest.

SWBT's entry into long-distance will increase consumer choice and reduce long distance prices, particularly for residential consumers. According to the FCC, "BOC entry into the long-distance market will benefit consumers and competition if the

³ See, 47 U.S.C. § 271(d)(2)(B).

⁴ Section 271 Order, pp. 5-6.

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relevant local exchange market is open to competition consistent with the competitive checklist. As a general matter, [the FCC] believe[s] that additional competition in telecommunications markets will enhance the public interest.”

* * *

Approval of SWBT's Application to the FCC for interLATA relief in Missouri will be in the public interest.

(Section 271 Order, pp. 89-90) (footnotes omitted)

In addition, the Commission addressed the issue of whether SWBT would have the ability to impede long-distance competition by entering the interLATA market. The Commission found as follows:

SWBT has no ability to impede long-distance competition by entering the interLATA market in Missouri. As the FCC has found, today's accounting safeguards and price regulation make misallocation of interLATA costs to local services hard to accomplish and relatively easy to detect. And any attempt to subsidize interLATA rates or to discriminate against competing long-distance carriers would be met with swift and stern action by the FCC.

SWBT's entry into the interLATA market is likely to spur competition in the local exchange market as well. Once SWBT is able to offer bundled packages of local and long-distance service, all potential entrants will have to compete even more intensely for local business in Missouri. The FCC has acknowledged that the fear of losing long-distance profits to the BOC once it is able to be a one-stop provider “would surely give long-distance carriers an added incentive to enter the local market.”

(Section 271 Order, pp. 87-88)(footnotes omitted)

The Commission issued a Notice Closing Case on April 2, 2001, which “closed” the Commission's official case file for administrative purposes. SWBT filed its application with the FCC on April 4, 2001. The Commission subsequently filed its comments with the FCC and recommended that the FCC approve SWBT's application. On June 7, 2001, however, SWBT voluntarily withdrew its application at the FCC. SWBT cited concerns raised by the United States Department of Justice and a recent appellate court decision as its reasons for withdrawing its application. On June 27, 2001, the Office of the Public Counsel filed a motion with the Commission which requested that the Commission “reopen” its case file, reconsider its evaluation of SWBT's application, and reconsider its recommendation to

the FCC. Some additional parties to the proceeding filed motions requesting similar relief.

Pursuant to Commission Order, SWBT made a presentation to the Commission and responded to Commission questions on August 16, 2001. SWBT explained the Loop Maintenance Operations System (LMOS) database, compliance with an appellate court decision, and the reduced prices it intended to voluntarily offer as part of the M2A. Also on August 16, 2001, SWBT filed a motion with the Commission asking the Commission to approve reduced rates for unbundled network elements in the M2A. The Commission reviewed the reductions and approved their inclusion in the M2A on August 30, 2001.

On August 20, 2001, SWBT refiled its application with the FCC for authority to provide in-region interLATA telecommunications services in the state of Missouri. SWBT filed this application jointly with its application for the state of Arkansas.

On September 4, 2001, the Commission issued its Order Denying Motions to Reconsider Recommendation and Opening Case for Monitoring Purposes, in which it denied various motions to reconsider its recommendation to the FCC. The Commission ordered that the case be kept open for administrative purposes for the continued receipt of periodic reports from the Staff of the Missouri Public Service Commission regarding SWBT's continued performance. The Commission also stated:

The Commission recognizes the benefits that additional competition in interLATA telecommunications services will bring to the state of Missouri. Given the Commission's continued monitoring, the improved performance of Southwestern Bell since the competitive companies have been operating under the M2As in Missouri, the fact that the Commission is working diligently to determine the appropriate long-term rates, subject to true-up, where those rates had not previously been set, and the fact that the M2A rates will now be lower than previously offered, the Commission finds no new information sufficient to reconsider its previous recommendation. The Commission continues to support Southwestern Bell's application for in-region interLATA authority.

(Order, p. 7)

C. Case No. TA-2001-475 (consolidated with Case No. TA-99-47).

SBCS filed a verified application on March 7, 2001, requesting that the Commission issue SBCS a certificate of service authority to provide intrastate interexchange telecommunications services in Missouri using the fictitious name SBC Long Distance. SBCS requested that the grant of authority be conditioned on federal authority to provide in region interLATA services. While SBCS indicated that it will use the name "Southwestern Bell Long Distance" as the primary provider of

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interexchange telecommunications services for SBCS in Missouri, in certain circumstances customers may make Missouri intrastate interexchange calls that are branded under the "SBC Long Distance" name. The SBC Long Distance application was filed in conformance with the Commission's customs and procedures of requiring separate filings for each fictitious name of an applicant telecommunications company. Therefore, SBCS filed separate applications for certificates of service authority and tariffs using the two separate fictitious names. The two applications, and accompanying tariffs, as finally submitted are identical, other than the names under which SBCS will do business in Missouri.

As in Case No. TA-99-47, SBC Long Distance asked the Commission to classify it as a competitive company and waive certain statutes and rules as authorized by Sections 392.361 and 392.420. On March 7, 2001, SBCS also filed proposed tariffs in conjunction with its applications in both Case Nos. TA-2001-475 and TA-99-47 with an effective date of April 23, 2001. On numerous occasions throughout the proceedings, SBCS extended the effective dates of the tariffs to permit the Staff sufficient time to review the proposed tariffs. In addition, SBCS filed numerous substitute tariff sheets designed to clarify issues raised by Staff or other parties.

The Commission issued a Notice of Applications for Intrastate Certificates of Service Authority and Opportunity to Intervene in Case No. TA-2001-475 on March 20, 2001, directing parties wishing to intervene to file their requests by April 4, 2001. Applications to intervene were filed by the Missouri Independent Telephone Group, AT&T, and STCG.

On September 7, 2001, Staff filed its Staff Recommendation in Case Nos. TA-2001-475 and TA-99-47. In the Staff Recommendation, the Staff recommended that the Commission grant Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance and d/b/a SBC Long Distance, certificates to provide interexchange telecommunications services; deny SBCS competitive classification; deny SBCS's waiver request; and order SBCS to file new tariffs consistent with the Staff's recommendation. The Staff Recommendation noted that the proposed tariffs were acceptable, with the exception of the competitive classification and the competitive waivers.

On September 13, 2001, the Commission issued its Order Granting Interventions, which granted intervention to AT&T, MITG, and STCG. On October 9, 2001, the Commission suspended the proposed tariffs until February 17, 2002, a prehearing conference was scheduled for October 19, 2001, and the cases were consolidated.

A prehearing conference was held on October 19, 2001. The following parties appeared at the prehearing conference: SBCS, Staff, Public Counsel, MITG, STCG, AT&T, and WorldCom. No other parties or participants appeared at the pre-hearing conference.

A Joint Recommendation (attached as Attachment 1) was filed on October 24, 2001, by SBCS and Staff. Public Counsel and STCG were also signatories to the Joint Recommendation and stated that they are not opposed to the adoption of the Joint Recommendation by the Commission, and do not request a hearing. The

Joint Recommendation filed by Staff and SBCS recommended that the Commission:

1. Grant Southwestern Bell Long Distance and SBC Long Distance certificates to provide interexchange telecommunications services in the state of Missouri, conditioned on federal authority to provide in-region interLATA services.
2. Classify Southwestern Bell Long Distance and SBC Long Distance and their services as competitive.
3. Approve the waivers listed in the Notice of Applications.
4. Approve the certificates of service authority and the proposed tariffs of Southwestern Bell Long Distance and SBC Long Distance, P.S.C. MO Tariff Nos. 1 & 2, as amended and substituted, with an effective date that would be concurrent with the effective date of the order of the Federal Communications Commission ("FCC") granting SBCS federal authority to provide in-region interLATA services in Missouri, or as soon thereafter as practicable.

As part of the Joint Recommendation, SBCS further agreed to the following provisions:

1. That SBCS, as well as any underlying interexchange carriers whose services are used to provide interexchange services, will utilize Feature Group D signaling protocols and arrangements for transporting and carrying their interexchange traffic in the State of Missouri.
2. That all interexchange services of SBCS will be available where facilities permit throughout the geographic area served by Southwestern Bell Telephone Company, as referenced in SBCS' intrastate tariffs.
3. That SBCS will comply with the provisions in Data Request No. 1 which was attached and incorporated by reference to the Joint Recommendation.
4. SBCS further agreed that SBCS is an "affiliate" of SWBT.

On October 24, 2001, SBCS and Staff filed their Joint Motion for the Adoption of Procedural Schedule and for Expedited Treatment. On that same date, the

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Commission issued its Order Directing Filing, which set the date for filing responses to the above Joint Motion and directed the filing of SBCS's direct testimony on October 26, 2001. Also on October 24, 2001, AT&T filed its Proposed Procedural Schedule and Motion to Modify Protective Order and Clarify Burden of Proof.

On October 31, 2001, the Commission issued its Order Setting Procedural Schedule which scheduled the filing of all other testimony, list of issues, position statements, and scheduled an evidentiary hearing. SBCS and Staff filed their testimony supporting the Joint Recommendation on October 26, 2001, and November 8, 2001, respectively. No other party filed testimony in this proceeding.

The Missouri Independent Telephone Group originally filed opposition to the Joint Recommendation. However, the MITG has since withdrawn that response and did not at any time request a hearing.

On November 7, 2001, AT&T filed a Notice of Withdrawal, stating that it withdrew its intervention. On November 9, 2001, Staff and SBCS filed a motion requesting that the hearings be canceled and the Joint Recommendation be adopted. On October 15, 2001, the Commission granted AT&T permission to withdraw and canceled the procedural schedule with the exception of the hearing.

An evidentiary hearing was held on November 19, 2001. SBCS, Staff, and Public Counsel were the only parties appearing at the hearing. The parties present stipulated to the admissibility of the Direct Testimony of Joe Carrisalez, the Direct Testimony of Dr. Debra Aron, the Rebuttal Testimony of Christopher C. Thomas, and the Joint Recommendation. The Commission took notice of its decisions in Case No. TO-99-227 and the numerous decisions listed in Schedule 2 to Exhibit 1. The Commission also took notice of the FCC's Memorandum Opinion and Order, adopted November 16, 2001.⁵

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The evidence of all of the parties has been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

SBCS is a Delaware and Virginia corporation with its principal office located at 5850 West Las Positas Boulevard, Pleasanton, California 94588. SBCS is a wholly owned subsidiary of SBC Communications Inc. SBCS is SBC Communications Inc.'s subsidiary that will offer Interexchange Telecommunications Services. SBCS is structurally separate from SWBT, another wholly owned subsidiary of SBC Communications Inc. SBCS is affiliated with SWBT, but is not a subsidiary of SWBT.

⁵ *In the Matter of the Joint Application by SBC Communications, Inc., Southwestern Bell telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194, Memorandum Opinion and Order, FCC 01-338 (Adopted November 16, 2001).*

Issues To Be Resolved By The Commission**A. Is the grant of certificates of interexchange service authority to the applicant in the public interest?**

SBCS filed two applications for interexchange telecommunications authority within the state of Missouri. The applications were identical in substance but were filed in accordance with Commission practice for each of the fictitious names under which SBCS will operate.

Commission Rule 4 CSR 240-2.060 requires a company applying for certification to provide telecommunications services to include in its application certain identifying information, a certificate from the Secretary of State showing that it is authorized to do business in Missouri, a request for competitive classification, if applicable, a description of the exchanges where it will offer service, and a proposed tariff with a 45-day effective date. SBCS provided the required documentation in its verified applications and the Commission finds these factual allegations to be true.

The Commission took notice of its previous findings in Case No. TO-99-227. The Commission found in Case No. TO-99-227 that SBCS's entry into long-distance will increase consumer choice, thereby clearly promoting the public interest. In addition, the Commission heard testimony from SBCS's witnesses, Mr. Carrisalez and Dr. Aron, that SBCS's entry into the long distance market will promote the public interest. The Commission finds the testimony of Mr. Carrisalez and Dr. Aron to be persuasive.

Dr. Debra Aron, SBCS's expert economist, testified that after extensive review and study of the economics of competition in the long-distance telecommunications market, she has concluded it is in the public interest to grant SBCS certificates of service authority to provide intrastate interexchange service. The Commission finds that the trend in competitive long-distance since the FCC found AT&T to be "non-dominant" in 1995, is toward increased competition. However, as Dr. Aron testified, nearly 70 percent of the residential long-distance customers are currently served by one of three large carriers. The Commission finds that SBCS's entry will most likely reduce the current concentration of market share among a few providers in the long-distance industry, thus enhancing competition. The Commission finds that, as Dr. Aron testified, the enhanced competition provided by SBCS in the long-distance market, will "ensure that customers pay only reasonable charges for. . . [those] services." The Commission also finds that SBCS's entry into the market will promote diversity of services and products to Missouri customers.

The Commission finds that SBCS's pricing plans are simple and easy to understand. The prices are competitive and offer consumers an attractively priced service with no monthly fees. The Commission also finds that SBCS is providing similar plans in its service areas in Texas, Kansas, and Oklahoma.

B. Are the interexchange telecommunications services offered by the applicant competitive telecommunications services? Should the applicant be classified as a competitive company?

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The Commission has regularly issued certificates to more than 600 IXCs – including affiliates of other ILECs — classified as “competitive” in Missouri. A minimum of 74 carriers serve with 1+ service in each SWBT exchange in Missouri. In addition, as Mr. Carrisalez has testified, this Commission already has determined that SWBT’s entry into the long-distance market will benefit the public interest by increasing competition in the provision of telecommunications services in Missouri.

Dr. Aron also presented evidence which demonstrated the competitive nature of the interexchange market⁶:

Permitting SBCS to compete freely as any other new entrant will ensure that customers pay only reasonable charges for telecommunications services by bringing additional competition to the marketplace. I would anticipate enhanced competition for residential customers, which is a direct benefit of competition. (A.20)

According to the Missouri Commission’s recent Annual Report, there are now 608 certified interexchange providers in Missouri, all of whom have been determined by the Commission to be competitive. This means that even now, Missouri consumers have a relatively large number of alternative suppliers to turn to should any rival attempt to raise prices to supra-competitive levels. The entry of SBCS will – as the Commission found in its March 2001 *Section 271 Order* – enhance this level of competitiveness even more and provide additional choices. (A.8)

Dr. Aron further testified that it was in the public interest for SBCS to provide these services on a competitive basis. The Commission finds Dr. Aron’s testimony persuasive.

The Commission also heard the testimony of Mr. Carrisalez, who stated that interexchange telecommunication services are competitive services and that all of SBCS’s services are competitive services. Therefore, the Commission finds that all of the interexchange services proposed by SBCS are competitive services.

C. Should the Commission waive certain Commission rules and statutory provisions, as requested in the applications, pursuant to Section 392.420?

Mr. Thomas testified that the waivers requested are the same as the waivers typically granted to competitively classified companies. In the Joint Recommendation, Staff also agrees that these waivers should be granted. Staff Counsel

⁶ See generally Testimony of Dr. Aron (Q6-Q18).

explained that the Commission has sufficient access to SBCS records, through its statutory jurisdiction and promulgated rules operating in conjunction with the agreement of SBCS in the Joint Recommendation, to determine if it is pricing its services inappropriately. Staff further explained that the Commission has authority to take action to remedy improper pricing activity even after these waivers are granted. The Commission finds that the waivers requested by SBCS in these proceedings are identical to those historically granted to competitive carriers by this Commission in the issuance of certificates of interexchange service authority. The Commission also finds that no other interexchange carrier in the state is being required to follow these statutory or regulatory provisions.

D. Should the applicant's tariffs, as filed and substituted, be approved?

SBCS filed illustrative tariffs in conjunction with its applications. Southwestern Bell Long Distance's tariffs describe the rates, rules, and regulations it intends to use, identifies SBCS as a competitive company, and lists the waivers requested. SBC Long Distance's tariffs also describe the rates, rules, and regulations it intends to use, identifies SBC Long Distance as a competitive company providing competitive services, and lists the waivers requested. Throughout this proceeding, SBCS extended the effective date of its tariffs to allow Staff sufficient time to review the tariffs and, based upon their extensive review, the Staff recommends approval of the rates and conditions contained therein. Mr. Thomas recommended that SBCS's tariffs, as amended and substituted, be approved by the Commission.

Dr. Aron presented expert testimony showing that the marketplace is competitive and will ensure that SBCS's rates are just and reasonable. She stated:

As I have explained above, the market in Missouri is competitive, there appear to be more than 600 competitors authorized to provide service, SBCS enters with no market share and no customers, the Big 3 continue to have nearly a 70 per cent share in residential long-distance customers, and the barriers to new entry are low. Under these circumstances, it is highly unlikely that SBCS could engage in any exclusionary conduct which would injure competition or consumers in Missouri. As a result, the Commission can rely on the marketplace to ensure that SBCS' rates are just and reasonable. (A.18)

The Commission found the testimony of Dr. Aron and Mr. Thomas persuasive. The Commission finds that the proposed tariffs as amended detail the services, equipment, and pricing SBCS proposes to offer. Based upon the competent and substantial evidence in the record, the Commission finds that SBCS's tariffs as amended should be approved.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

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The Commission has jurisdiction over this matter, and the authority to grant certificates of service authority, classify interexchange companies and their services, and waive statutory provisions and regulations, pursuant to Sections 392.361, 392.370, 392.410, 392.430, 392.440, and 392.420, RSMo 2000.

The Commission is authorized by Sections 392.430 and 392.440 to grant interexchange companies certificates of service authority. The Commission is also authorized by Section 392.361 to determine whether a telecommunications company or service may be subject to sufficient competition to justify a lesser degree of regulation; and the Commission is likewise authorized to classify telecommunications companies as competitive upon a finding that all telecommunications services offered by such company are competitive telecommunications services.

In making its determination regarding competitive classification, Missouri law expressly provides that: "In any hearing involving the same telecommunications service or company, the commission may, if appropriate and if no new finding of fact is required, rely on a finding of fact made in a prior hearing." Section 392.361(2). The Commission may take administrative notice of its own decisions and the decisions of the Federal Communications Commission, and hereby exercises its discretion to take administrative notice of the orders and decisions cited within the body of this Report and Order. In addition, the Commission takes administrative notice of its previous orders granting certificates of service authority and approving tariffs to other interexchange carriers in Missouri, specifically those orders referenced in the Direct Testimony of Joe Carrisalez. The Commission also takes notice of the FCC's Memorandum Opinion and Order, adopted November 16, 2001, in CC Docket No. 01-194.⁷

The Commission is authorized by Section 392.420 to suspend or modify the application of its rules or the application of any statutory provision contained in Section 392.200 to Section 392.340 if such waiver or modification is otherwise consistent with the purposes of Chapter 392.

Having made the required findings of fact, the Commission concludes as follows:

SBCS is a Delaware and Virginia corporation with its principal office located at 5850 West Las Positas Boulevard, Pleasanton, California 94588. Southwestern Bell Communications Services, Inc., is a wholly owned subsidiary of SBC Communications, Inc., and a Section 272 affiliate of SWBT. The entry by SBCS into the market for intrastate and interstate interLATA service in Missouri is subject to Sections 271 and 272 of the Telecommunications Act of 1996 (the Act). As required by the Act, SBCS and SWBT are legally, financially, and operationally separate subsidiaries of SBC Communications, Inc. Also, SBCS is structurally separate from SWBT; SBCS has no directors, officers, or employees in common with SWBT. Furthermore, all business relationships between SBCS and SWBT are conducted

⁷ *In the Matter of the Joint Application by SBC Communications, Inc., Southwestern Bell telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri.*

in accordance with Section 272 and the FCC's affiliate transaction rules, which prevent the use of non-competitive services to subsidize competitive services. On November 16, 2001, the FCC issued its Memorandum Opinion and Order granting SBCS and SWBT authority to provide in-region interLATA services. That order became effective on November 26, 2001. Therefore, SBCS is authorized to provide in-region interLATA services in Missouri by the FCC pursuant to Section 271 of the Act.

The Commission concludes that competition in the intrastate interexchange telecommunications market is in the public interest. Based upon the competent and substantial evidence in the record and the Commission's previous findings in its Section 271 Order in Case No. TO-99-227 (of which it has taken administrative notice), the Commission finds that the grant of certificates of interexchange service authority to SBCS d/b/a Southwestern Bell Long Distance and d/b/a SBC Long Distance is in the public interest. The Commission therefore concludes that SBCS should be granted certificates of service authority. The Commission's findings here are reinforced by the repeated findings of the Federal Communications Commission that the offering of interLATA services by BOC long-distance affiliates that satisfy the requirements of Sections 271 and 272 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, is in the public interest under those federal statutes.

The Commission has repeatedly found that: "sufficient competition does exist to justify a lesser degree of regulation **of all interexchange services and all interexchange carriers.**" The Commission has also repeatedly found that: "**such lesser degree of regulation is consistent with the protection of ratepayers and promotes the public interest.**"⁸

The FCC has also treated interexchange services as competitive services, even when provided by a BOC affiliate pursuant to Sections 271 and 272 of the Communications Act. The FCC has long regarded the provision of long-distance services as being competitive. When the FCC classified AT&T as a non-dominant carrier in domestic interstate interexchange services in 1995, it effectively concluded that no carrier was capable of exercising market power in interstate long-distance services. The FCC also decided in 1997 that BOC long-distance affiliates that comply with Section 272 would be regulated as non-dominant carriers. In an FCC decision⁹ regarding interexchange services, the FCC stated:

[W]e conclude that the BOCs' interLATA affiliates will not have the ability, upon entry or soon thereafter, to raise the price of in-region, interstate, domestic, interLATA services by restricting their own output, and, therefore, that the BOC interLATA affili-

⁸ *In Re Investigation For The Purpose Of Determining The Classification Of The Services Provided By Interexchange Companies Within The State Of Missouri*, 1989 Mo. PSC LEXIS 24 (November 9, 1989) at 26-27.

⁹ *Regulatory Treatment Of LEC Provision Of Interexchange Services Originating In The LEC's Local Exchange Area and Policy And Rules Concerning The Interstate, Interexchange Marketplace*, 12 FCC Rcd 15,756 (1997), paragraphs 133-134.

ates should be classified as non-dominant in the provision of those services. . . . [O]ur experience with regulating the independent LECs' provision of interstate, domestic, interexchange services and the BOCs' provision of enhanced services suggests that our existing safeguards have worked reasonably well and generally have been effective, in conjunction with our regular audits, in deterring the improper allocation of costs and unlawful discrimination. . . . We believe that the entry of the BOC interLATA affiliates into the provision of in-region, interLATA services has the potential to increase price competition and lead to innovative new services and market efficiencies. We recognize that, as long as the BOCs retain control of local bottleneck facilities, they could potentially engage in improper cost allocation, discrimination, and other anticompetitive conduct to favor their affiliates' in-region, interLATA services. We conclude, however, that, to the extent dominant carrier regulation addresses such anticompetitive conduct, the burdens imposed by such regulation outweighs its benefits. We therefore see no reason to impose dominant carrier regulation on the BOC interLATA affiliates, given that section 272 contains numerous safeguards designed to prevent the BOCs from engaging in improper cost allocation, discrimination, and other anticompetitive conduct.

More recently, the FCC discussed the competitive nature of interexchange services and that BOC affiliates should be treated like other long-distance carriers.¹⁰ The FCC concluded that the BOC 272 affiliate may bundle customer premises equipment with its services. In so doing, it addressed whether BOC long-distance affiliates have market power in the provision of long-distance services:

We adopt our tentative conclusion that to the extent the BOCs' section 272 affiliates, as well as independent incumbent LECs' affiliates, are classified as nondominant in the provision of interstate, domestic, interexchange services, these carriers may bundle CPE with such services to the same extent as other nondominant carriers. As we explained in the Further Notice, the Commission has concluded that the requirements established by, and the rules implemented pursuant to, sections 271 and 272 of the Act, together with other Commission rules, limit sufficiently the ability of a BOC's section 272 affiliate to use the BOC's market power in the local exchange or exchange access market to raise and sustain prices of interstate,

¹⁰ See e.g., *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-61 & 98-183, *Report and Order*, FCC 01-98 (released March 30, 2001).

interLATA services above competitive levels. It has therefore determined that a BOC entering the in-region interLATA market through a section 272 affiliate will be regulated as a nondominant interexchange carrier. BOCs providing out-of-region interstate, domestic, interexchange service are also nondominant. We agree with BellSouth that these findings demonstrate that, once a BOC has satisfied the requirements of sections 271 and 272 of the Act, its long-distance affiliate has the same market characteristics as any other nondominant interexchange carrier and that there is no basis for denying them the same bundling relief that we grant to those other carriers. (Emphasis added).

The Commission concludes that all the interexchange telecommunications services offered by SBCS are competitive telecommunications services. The Commission further concludes that SBCS and all of the services SBCS proposes to offer are subject to sufficient competition to justify a lesser degree of regulation. The Commission concludes that such lesser degree of regulation is consistent with the protection of the ratepayers and promotes the public interest. The Commission therefore concludes that SBCS's services should be classified as competitive services, and SBCS should be classified as a competitive company.

The Commission has found that the waivers requested by SBCS in these proceedings are identical to those historically granted to competitive carriers by this Commission in the issuance of certificates of interexchange service authority. The Commission finds that it is appropriate and reasonable to regulate all similarly situated interexchange carriers in a similar manner. Based upon the competent and substantial evidence in the record, and the Commission's long-standing policy of granting these waivers of the statutory and regulatory provisions to interexchange carriers operating in Missouri, the Commission finds and concludes that it should waive certain rules and statutory provisions, as requested by SBCS, pursuant to Section 392.420, and that such waiver is reasonable and not detrimental to the public interest. The Commission further concludes that waiving the statutes and Commission rules set out in the ordered paragraph below is reasonable and consistent with the purposes of Chapter 392.

The Commission concludes that SBCS's proposed tariffs detail the services, equipment, and pricing it proposes to offer, and are similar to tariffs approved for other Missouri certificated interexchange carriers. The Commission concludes that the proposed tariffs filed on March 7, 2001, as amended and substituted, should be approved to become effective as ordered below.

Each party that has requested a hearing in this matter, has since either withdrawn as a party or has acquiesced in the settlement of the issue through the Joint Recommendation. The Commission further concludes that the Joint Recommendation (attached to this order as Attachment 1) should be treated as a unanimous stipulation and agreement pursuant to the provisions of the Commission's Rule 4 CSR 240-2.115. Finally, the Commission concludes that the Joint Recommendation filed by Staff and SBCS and signed by Public Counsel and STCG is reasonable and should be adopted.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance and Southwestern Bell Communications Services, Inc., d/b/a SBC Long Distance are each granted a certificate of service authority to provide intrastate interexchange telecommunications services in the state of Missouri, subject to all applicable statutes and Commission rules except as specified in this order. The certificates shall become effective on December 7, 2001.
2. That Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance and d/b/a SBC Long Distance is classified as a competitive telecommunications company. Application of the following statutes and regulatory rules shall be waived:

Statutes		
392.210.2	-	uniform system of accounts
392.240.1	-	rates-rentals-service & physical connections
392.270	-	valuation of property (ratemaking)
392.280	-	depreciation accounts
392.290	-	issuance of securities
392.300.2	-	acquisition of stock
392.310	-	stock and debt issuance
392.320	-	stock dividend payment
392.330	-	issuance of securities, debts and notes
392.340	-	reorganization(s)

Commission Rules		
4 CSR 240-10.020	-	depreciation fund income
4 CSR 240-30.010(2)(C)	-	posting of tariffs
4 CSR 240-30.040	-	uniform system of accounts
4 CSR 240-33.030	-	minimum charges
4 CSR 240-35	-	reporting of bypass and customer-specific arrangements

3. That the tariffs filed by Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance on March 7, 2001, under tariff number 200100925, as amended, is approved to become effective on December 7, 2001. The tariffs approved are:

P.S.C. Mo. Tariff No. 1
Original Sheet 1 through 240

P.S.C. Mo. Tariff No. 2
Original Sheet 1 through 188

4. That the tariffs filed by Southwestern Bell Communications Services, Inc. d/b/a SBC Long Distance on March 7, 2001, under tariff number 200100928, as amended, is approved to become effective on December 7, 2001. The tariffs approved are:

P.S.C. Mo. Tariff No. 1
Original Sheet 1 through 240

P.S.C. Mo. Tariff No. 2
Original Sheet 1 through 188

5. That the Joint Recommendation (attached as Attachment 1 to this Report and Order) filed by the Staff of the Missouri Public Service Commission and Southwestern Bell Communications Services, Inc., on October 24, 2001, should be adopted.

6. That Southwestern Bell Communications Services, Inc., as well as any underlying interexchange carriers whose services are used to provide interexchange services, will utilize Feature Group D signaling protocols and arrangements for transporting and carrying their interexchange traffic in the State of Missouri.

7. That all interexchange services of Southwestern Bell Communications Services, Inc. will be available where facilities permit throughout the geographic area served by Southwestern Bell Telephone Company, as referenced in Southwestern Bell Communications Services, Inc.'s intrastate tariffs.

8. That Southwestern Bell Communications Services, Inc., will comply with the provisions in Data Request No. 1 which was attached and incorporated by reference to the Joint Recommendation.

9. That any objection not ruled on is overruled, any motion not ruled on is denied, and any exhibit not admitted is excluded.

10. That this order shall become effective on December 7, 2001.

11. That this case may be closed on December 8, 2001.

Simmons, Ch., Murray, and Lumpe, CC., concur;
Gaw, C., concurs, with concurring opinion attached;
and certify compliance with the provisions of
Section 536.080, RSMo 2000.
Forbis, C., not participating.

Editor's Note: Attachment 1, the Joint Recommendation in this case, has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

CONCURRING OPINION OF COMMISSIONER STEVE GAW

I concur in the conclusion reached by the majority in this case. The previous decision of this Commission to recommend that Southwestern Bell Communications Services, Inc. (SBCS) be allowed to compete in the long distance market, the order of the FCC allowing SBCS to do so in Missouri, the unanimous stipulation of the remaining parties to this case, and a record comprised entirely of evidence supplied by the parties supporting the stipulation would arguably permit no other conclusion. The entry of SBCS into the long distance market will likely in the short run result in lower prices for Missouri's consumers. This is a positive result that many advocates of competition extolled. Experience in other states where SBCS has entered the market supports this conclusion. Of all of the land based telephone industry, competition is the most mature in the long distance market. Thus, allowing SBCS into the market as a competitor would seem a natural progression.

In the long run, however, this market may change. This Commission must be conscious that if competition is to work there must be companies in the market

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which possess the ability to compete on similar footing. If Southwestern Bell Telephone Company, which possesses by far the largest local basic customer base in Missouri, and its affiliates including SBCS are so successful in their marketing of bundled telephone services that other large long distance companies are unable to effectively compete, the policy established in this decision should be re-examined.

A more immediate concern, however, is that SBCS only intends to market long distance service where it delivers local basic service. If as anticipated SBCS's long distance prices bring other companies prices down within its territory it could result in interexchange carrier's (IXC's) with statewide tariffs pulling out of portions of the state, particularly rural territories. This incentive will arguably exist for at least three reasons. First, access rates in rural ILEC territories tend to be higher. Second, with smaller numbers of customers the potential loss of profits (if any) is small. Finally, any IXC offering a pricing plan must offer it for the same price in any territory in Missouri in which its tariff applies. One way for a large IXC to better compete with SBCS may be to cut higher cost regions from its territory. Indeed AT&T has already made statements that it is contemplating pulling out of the long distance market in some parts of rural Missouri. The result could be that this state has a two-tier system of pricing in long distance – one in the urban/suburban areas of the state where the major IXC's do business – and a higher priced market in rural areas outside of SBCS territory. This Commission must be vigilant to guard against such a result. SBCS made assurances in the hearing that it intends to eventually enter the long distance market statewide. This action would reduce the possibility of creating a two-tier system of long distance cost. I look forward to seeing such an expansion filed.

In the matter of Associated Natural Gas Company's Tariff Revisions to be Reviewed in its 1995-1996 Actual Cost Adjustment.

In the matter of Associated Natural Gas Company's Tariff Revision to be Reviewed in its 1996-1997 Actual Cost Adjustment.

In the matter of Associated Natural Gas Company's Purchased Gas Adjustment Factors to be Reviewed in its 1997-1998 Actual Cost Adjustment.

In the matter of Associated Natural Gas Company's Purchased Gas Adjustment Factors to be Reviewed in its 1998-1999 Actual Cost Adjustment.

In the matter of Atmos Energy Corporation's Purchased Gas Adjustment to be Reviewed in its 1999-2000 Actual Cost Adjustment.

*Case Nos. GR-96-227, GR-97-191, GR-98-399,
GR-99-392 & GR-2000-573
Decided November 27, 2001*

Gas §17.1. The Commission approved a settlement agreement and release that resolved pending litigation in cases relating to a gas company's actual cost adjustment for five separate years.

**ORDER APPROVING
FIRST AMENDED SETTLEMENT AGREEMENT AND RELEASE**

This order approves the first amended settlement agreement and release filed by the parties.

Summary

In five cases, at various stages of litigation, involving Associated Natural Gas Company's actual cost adjustment and purchased gas adjustment from periods beginning in the year 1995 to the year 2000, there are alleged or potential double recoveries of gas costs. Should Associated be required to perform certain conditions, including a lump sum payment, to resolve all the cases?

The Commission, in approving the amended agreement, answers yes.

Parties

The parties to these cases are Associated Natural Gas Company, Atmos Energy Corporation (who is in these cases because Associated sold its Missouri properties to Atmos, effective June 1, 2000), the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel.

Brief Procedural History**Case Number GR-96-227**

This is an Actual Cost Adjustment case involving the 1995-1996 ACA period (September 1, 1995 through August 31, 1996) in which, on January 26, 1999, the Commission issued a Report and Order where it determined that Associated should reduce the gas costs in its Southeast Missouri district by \$254,476 to eliminate an alleged double recovery of gas costs. The full amount of the Commission's disallowance was paid into the registry of the Circuit Court of Cole County by Associated under a stay order and is being held in an interest-bearing account.

Case Number GR-97-191

This is an ACA case involving the 1996-1997 ACA period (September 1, 1996 through August 31, 1997) in which, on February 29, 2000, the Commission issued a Report and Order where it determined that Associated should reduce the gas costs in its SEMO district by \$382,182 to eliminate an alleged double-recovery of gas costs. No stay order has been entered and Associated has made no payments into the registry of the Court.

Case Number GR-98-399

This is an ACA case involving the 1997-1998 ACA period (September 1, 1997 through August 31, 1998). No procedural schedule has been established.

Case Number GR-99-392

This is an ACA case involving the 1998-1999 ACA period (September 1, 1998 through August 31, 1999). No procedural schedule has been established.

Case Number GR-2000-573

This is an ACA case involving the 1999-2000 ACA period (September 1, 1999 through August 31, 2000). No procedural schedule has been established.

First Amended Settlement Agreement and Release

On July 17, 2001, the parties filed a settlement agreement and release. The Commission, having questions concerning the agreement, convened a question-and-answer session on the record on July 25, 2001. As a result of that session, the parties filed their first amended settlement and agreement and release on November 2, 2001. Briefly restated, the agreement contained the following major points:

Case number GR-96-227: Associated will not seek further judicial review of the Commission's Report and Order.

Associated will pay out the \$254,476.00 deposited with the Circuit Court under this order and the Circuit Court's order.

Case number GR-97-191: Associated will file a motion to dismiss case number 00CV323609 with prejudice within five days after this order becomes nonappealable.

Case number GR-98-399: The parties recommend that the Commission issue an order which acknowledges the agreement, recites that all of the issues presented in case number GR-98-399, or which could have been presented in that case, have been fully compromised by the agreement, and unconditionally closes case number GR-98-399, within 30 days after this order becomes nonappealable.

Case number GR-99-392: The parties recommend that the Commission issue an order, within 30 days after this order becomes nonappealable, which:

a) separates the issues relating to Associated's natural gas purchasing from issues relating to a "peak day study" or reliability of gas supplies on the system now owned and operated by Atmos; and

b) creates a new case into which it transfers the Atmos issues.

Case number GR-2000-573: The parties recommend that the Commission issue an order, within 30 days after this order becomes nonappealable, which:

a) separates the period relating to Associated's natural gas purchasing in Missouri (i.e., September 1, 1999 through May 31, 2000) from the period relating to Atmos' natural gas purchasing in Missouri (i.e., June 1, 2000 through August 31, 2000); and,

b) creates a new case into which it transfers all issues arising out of Atmos' natural gas purchasing in Missouri during the June 1, 2000 through August 31, 2000 period, and bars the parties from raising any claims against Atmos based on the acts or omissions of Associated.

Case number GR-97-272: The agreement does not affect case number GR-97-272. (Note: This order does not affect this case.)

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Lump Sum Payment(s) by Associated.

- a) Within 30 days after this order becomes nonappealable, Associated will transfer to Atmos \$618,524.00); and
- b) within ten days after Associated receives the impounded funds in case number GR-96-227 from the Cole County Circuit Court, Associated will transfer to Atmos that amount.

Calculation of Refund Amounts and Disbursement of Lump Sum Payment(s) by Atmos.

- a) Associated will also divide the lump sum payment(s) by the actual one hundred cubic feet sales to Associated and Atmos customers.
- b) Atmos will use the refund amount per Ccf to determine the bill credit to then-current Atmos customers.
- c) Atmos will not be obligated to refund more than the lump sum payment(s) received from Associated.
- d) Atmos will credit any remainder to Atmos' existing Missouri ACA balance for what was the Associated SEMO district.

The agreement also had various other provisions concerning the implementation and effect of the agreement.

Findings and Decision

There is no need for a hearing since no party requested a hearing. The requirement for a hearing has been fulfilled when all those having a desire to be heard are offered an opportunity to be heard. The *Deffenderfer* case held that if no party requests a hearing, the Commission may determine that a hearing is not necessary and that the Commission may make a decision based on the agreement.¹

The Commission concludes that all issues were settled by the agreement. The Commission has the legal authority to accept an agreement offered by the parties as a resolution of issues raised in a case. Section 536.060, RSMo 2000, which allows parties to dispose of cases by agreement with summary action that waives procedural requirements, states:

Contested cases...may be informally resolved by consent agreement or agreed settlement or may be resolved by stipu-

¹ See *State ex rel. Deffenderfer Enterprises, Inc. v. P.S.C.*, 776 S.W.2d 494, 496 (Mo. App. 1989).

lation, consent order, or default, or by agreed settlement where such settlement is permitted by law. Nothing contained in sections 536.060 to 536.095 shall be construed...to prevent the waiver by the parties (including, in a proper case, the agency) of procedural requirements which would otherwise be necessary before final decision, or...to prevent stipulations or agreements among the parties (including, in a proper case, the agency).

Thus, the Commission will approve the agreement.

IT IS THEREFORE ORDERED:

- 1. That the Missouri Public Service Commission approves the first amended settlement agreement and release filed on November 2, 2001, by Associated Natural Gas Company, Atmos Energy Corporation, the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, and whose terms are set forth in Attachment A.
- 2. That nothing in this order may be considered a finding by the Missouri Public Service Commission of the value for ratemaking purposes of the transactions herein involved.
- 3. That the Missouri Public Service Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.
- 4. That this order will become effective on December 7, 2001.

Simmons, Ch., Murray, Lumpe and Gaw, CC., concur
Forbis, C., not participating

Hopkins, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

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**In the Matter of the Tariff Filing of Union Electric Company
d/b/a AmerenUE to Incorporate into the Company's Tariff a
Revised Procedure for the Development of Estimated Customer
Natural Gas Usage and Clarify and Update the Tariff
Provisions Describing the Company's Current Process for
Estimating Customer Gas Usage.**

*Case No. GT-2002-70
Decided November 29, 2001*

Gas §30. The Commission approved a stipulation and agreement that established a procedure for a gas company to use to estimate customer natural gas usage in situations where it is unable to obtain actual meter readings.

ORDER APPROVING STIPULATION AND AGREEMENT

This order approves a stipulation and agreement submitted by the parties regarding a tariff filed by Union Electric Company d/b/a AmerenUE.

AmerenUE filed a tariff on July 30, 2001, that would revise its billing practices. In particular, the tariff would revise the method used by AmerenUE to estimate gas usage when it is unable to obtain actual meter readings. AmerenUE's tariff bore an effective date of August 29. On August 14, the Office of the Public Counsel filed a motion asking the Commission to suspend that tariff. On August 22, the Staff of the Commission filed a response to Public Counsel's motion to suspend, in which Staff indicated that Staff, Public Counsel, and AmerenUE agreed that the tariff should be suspended until September 28, to allow the parties more time to resolve their differences regarding the tariff. On August 28, the Commission acted to suspend AmerenUE's tariff until September 28.

On September 21, the Commission ordered the parties to file a recommendation regarding the tariff not later than September 24. On September 24, Staff filed a recommendation, in which AmerenUE joined. Staff and AmerenUE recommended that the Commission suspend AmerenUE's tariff until November 1, to permit AmerenUE an opportunity to withdraw the tariff it had filed in July, and replace it with a tariff that was agreeable to Staff. Also on September 24, Public Counsel filed a request to further suspend AmerenUE's tariff. Public Counsel indicated that it did not accept the tariff revisions agreed to by Staff and AmerenUE. Public Counsel requested a hearing to resolve the question of whether the tariff should contain a formula for calculating multi-month estimated bills and an example of how multi-month estimated bills will be calculated using the formula proposed to be established in AmerenUE's tariff.

On September 27, the Commission further suspended the tariff until December 27, and directed the parties to file a proposed procedural schedule no later than October 5. On October 5, Staff, Public Counsel, and AmerenUE jointly proposed a procedural schedule leading to an evidentiary hearing on November 7. The Commission adopted the proposed procedural schedule on October 9.

In compliance with the procedural schedule, Staff and AmerenUE filed direct testimony on October 15. Public Counsel was scheduled to file rebuttal testimony on October 29, but instead, on October 23, the parties filed a Joint Motion to Suspend Procedural Schedule and Motion for Expedited Treatment. The parties indicated that they had reached an agreement and that they would be filing a unanimous stipulation and agreement. The Commission responded on October 25, by canceling the procedural schedule.

On October 29, the parties jointly filed a unanimous stipulation and agreement that purports to resolve all issues. Staff filed suggestions in support of the stipulation and agreement on November 21. The parties agree that the Commission should reject the tariff filed on July 27, and order AmerenUE to file tariff sheets in conformance with the specimen tariff sheets attached to the Stipulation and Agreement as Exhibit A. The parties agree that the specimen tariff sheets contain a reasonable procedure for AmerenUE to use to estimate customer natural gas usage in situations where it is unable to obtain actual meter readings.

In the Agreement, contingent upon the Commission's acceptance of the Agreement, the parties waived their rights to cross-examine witnesses, to present oral argument or briefs, to have the transcript read by the Commission, and to judicial review. The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case, pursuant to Section 536.060, RSMo 2000.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.¹ Since no one has requested a hearing, the Commission may grant the relief requested based on the Agreement.

After reviewing the Agreement of the parties and Staff's Suggestions in Support, the Commission finds that the unanimous stipulation and agreement filed on October 29 should be approved.

IT IS THEREFORE ORDERED:

1. That the unanimous stipulation and agreement filed on October 29, 2001 by Union Electric Company d/b/a AmerenUE, the Staff of the Public Service Commission, and the Office of the Public Counsel, is hereby approved as a resolution of all issues in this case (See Attachment 1).
2. That the tariff filed by Union Electric Company d/b/a AmerenUE on July 27, 2001, and assigned tariff number 200200068, is rejected. The tariff rejected is:

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1st Revised Sheet 56, Canceling Original Sheet 56
4th Revised Sheet 57, Canceling 3rd Revised Sheet 57

3. That Union Electric Company d/b/a AmerenUE shall file tariff sheets in conformance with the specimen tariff sheets attached to the unanimous stipulation and agreement.

¹ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

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4. That this order shall become effective on December 9, 2001.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Woodruff, Senior Regulatory Law Judge

Editor's Note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Missouri Public Service Commission.

In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules.

In the Matter of Laclede Gas Company's Tariff for a Weather Normalization Clause.

Case Nos. GR-2001-629 & GT-2001-662

Decided November 29, 2001

Evidence, Practice and Procedure §8. The Commission approved a unanimous stipulation and agreement whereby Laclede Gas Company was allowed a rate increase of 2.14% or \$11,985,000, plus a new service initiation fee that provided \$3,100,000.

Gas §21. Tariff sheets filed in this matter took into account agreed changes in Laclede's General Terms and Conditions of provision of service and Purchased Gas Adjustment and Actual Cost Adjustment clauses. These changes reflected the Commissions recent emergency amendment to the Cold Weather Rule, allowed Laclede flexibility to install advanced technology/remote reading metering, implemented a \$36 service initiation fee in four \$9 installments for new service connection that require company personnel to go to a particular address, eliminated references in the Purchased Gas Adjustment/Actual Cost Adjustment clauses to capacity release revenues, incorporated tariff provision relating to pricing for gas used in off-system sales, and expanded the seasonal commercial and industrial air conditioning rate schedule to include seasonal sales for on-site power generation customers.

Accounting §38. Although the parties were not precluded from proposing different treatment in the future, the settlement allowed Laclede to "normalize" the income tax timing differences associated with the pension accounting and post-retirement benefits other than pensions.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

AND

GRANTING EXPEDITED TREATMENT

AND

REJECTING AND APPROVING TARIFF SHEETS FILED IN

CASE NO. GR-2001-629

AND

REJECTING TARIFF SHEETS FILED IN

CASE NO. GT-2001-662

AND

CLOSING CASES

Syllabus:

This order approves the Unanimous Stipulation and Agreement (Exhibit 1, attached, hereafter Settlement) filed by all the parties on November 16, 2001. The settlement of the parties is implemented in this order including the rejection and approval of tariff sheets filed in these cases.

Settlement Authority:

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in these cases, pursuant to Section 536.060, RSMo 2000. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.¹ Since no one has requested a hearing, the Commission may grant the relief requested based on the Unanimous Stipulation and Agreement.

Laclede General Rate Increase – Case No. GR-2001-629:

On May 18, 2001, Laclede Gas Company filed tariff sheets reflecting increased rates for natural gas service provided to customers in the Missouri service area of the company. Laclede stated that the revised tariff sheets presented a general rate increase of approximately \$39.8 million, or approximately a 5% increase annually in the revenue of the company based on existing distribution and gas costs.

On June 7, 2001, the Commission acted to suspend the tariff through April 15, 2002. The Commission issued its Suspension Order and Notice on June 7, 2001, and directed notice providing for interested parties to file their applications to intervene no later than June 27, 2001.

Timely intervention applications were filed by the Missouri Energy Group,² the Paper Allied-Industrial, Chemical and Energy Workers Local No. 5-6, AFL-CIO, Union Electric Company, d/b/a AmerenUE, and the Missouri Industrial Energy Consumers.³ The Commission granted these requests in an order issued on July 13, 2001.

An early prehearing conference was held on July 16, 2001. Following that conference the Commission issued its Order Modifying and Adopting Procedural Schedule—Adopting Test Year—and Providing for True-Up Audit on August 6, 2001. On August 23, 2001, the Commission scheduled local public hearings for October 17, 2001, and provided for notice of the hearings.

On September 4, 2001, the Commission issued an order in Case No. GT-2001-662 consolidating that case with this case. On October 12, 2001, the Commission issued an order that joined all the parties in both cases and modified the procedural schedule slightly to accommodate the taking of the testimony required for Case No. GT-2001-662.

¹ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. 1989).

² Barnes-Jewish Hospital, DiamlerChrysler Corporation, Emerson Electric Company, SSM HealthCare, and St. John's Mercy Health Care.

³ Adam's Mark Hotel, Alcoa Foil Products, Anheuser-Busch, The Boeing Company, Ford Motor Company, General Motors Corporation, Hussman Refrigeration, Mallinckrodt, Inc., MEMC Electronic Materials, Monsanto Company, Procter & Gamble Manufacturing and Ralston Purina.

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A prehearing and settlement conference for these cases was convened during the week of October 22-26, 2001. As a result of the prehearing and further discussions and negotiations, the parties reached stipulations and agreements to resolve or dispose of the issues presented in these cases as presented in the Settlement.

Weather Mitigation Clauses and Alternative Rate Design – Case No. GT-2001-662:

On April 20, 2001, Laclede filed tariff sheets with a proposed effective date of July 19, 2001, to implement proposed alternative weather mitigation clauses and rate design mechanisms to stabilize company revenues and customer bills when weather is either colder or warmer than normal. Rates would be adjusted according to the mechanisms presented in the proposed tariffs.

This case was established on June 4, 2001, when the Office of the Public Counsel filed its Motion to Dismiss Tariff. The Public Counsel raised various issues with the proposed tariff sheets, particularly that the filing presented “single-issue ratemaking” in violation of Section 393.270, RSMo 2000, by failing to consider “all relevant factors.”

On June 18, 2001, the Commission’s Staff also filed a Motion to Dismiss, also raising the issue of single issue ratemaking, as well as an issue of “retroactive” ratemaking and also suggesting that weather normalization schemes must be considered in the context of a general rate case.

Laclede filed responses to the arguments presented by the Public Counsel and Staff on June 14 and June 28, 2001. Laclede argued that the Commission should deny the motions filed by the Public Counsel and Staff or alternatively that the Commission should consolidate its tariff filing proposing weather mitigation clauses and alternative rate designs into Case No. GR-2001-629, its general rate case. Laclede and the Public Counsel filed supplemental suggestions arguing their positions on August 7, 2001.

On September 4, 2001, the Commission issued its order denying the motions to dismiss filed by Staff and the Public Counsel, consolidating the case with Laclede’s general rate case, and further suspending the tariff sheets (Tariff File No. 200101074) to April 15, 2002, to coincide with the suspension date for the tariffs in Case No. GR-2001-629.

The Settlement:

The Unanimous Stipulation and Agreement (Settlement) filed on November 16, 2001, resolves disputed issues between all the parties, compromises or defers some issues without prejudice to present them in the future, provides for continued exchange of information and provides an agreed framework between the parties to resolve or raise issues that are not ripe for determination at this time.

Attachment 1 to the Settlement includes specimens of the agreed upon tariff sheets to implement the settlement. Attachment 1A shows the Proposed Revenue Allocation by Class and the percentage increases as a percent of distribution revenues/costs (column 6) and as a percent of all revenues/costs including gas costs (column 10).

Attachment 2 presents agreed upon decision and measurement matrixes the parties will apply in the future to measure the fiscal impact of the Commission’s

Cold Weather Default Emergency Rule. Attachment 3 is the agreed depreciation schedule implementing the Settlement.

Laclede's original rate increase request of \$39.8 million and an overall percentage increase of 5% is compromised to a total increase of \$11,985,000 plus a new service initiation fee that will provide \$3,100,000. The overall percentage increase shown on Attachment 1A is 2.14%. Attachment 1A shows the percentage increase for each customer class. If the Commission approves the Settlement, Laclede has agreed to notify customers that might benefit from switching their rate classification. The tariff sheets reflect a rate design that takes into account the fiscal impact of such changes.

The tariff sheets also take into account agreed changes in Laclede's General Terms and Conditions for provision of service and Purchased Gas Adjustment (PGA) and Actual Cost Adjustment (ACA) clauses. The changes reflect the Commission's recent emergency amendment to the Cold Weather Rule (Case No. AX-2002-203); allow Laclede flexibility to install advanced technology/remote reading metering; implement a \$36 service initiation fee in four \$9 installments for new service connections that require company personnel to go to a particular address; eliminate references in the PGA/ACA clauses to capacity release revenues; incorporate tariff provisions relating to pricing for gas used in off-system sales; and expand the seasonal commercial and industrial air conditioning rate schedule to include seasonal sales for on-site power generation customers.

The Settlement resolves issues related to pension accounting and post-retirement benefits other than pensions and their treatment and impact on rates in this case and provides for deferral and consideration of some of these matters in future rates. The settlement of the pension and post-retirement benefits issues takes into account the requirements of the Financial Accounting Standards Board. The Settlement also allows Laclede to "normalize" the income tax timing differences associated with the pension accounting and post-retirement benefits other than pensions, but the parties are not precluded from proposing a different treatment in the future.

The agreed rates recommended in the Settlement take into account an imputed revenue level of \$750,000 annually related to the Commission's Emergency Cold Weather Rule Amendment. However, the parties agreed to track associated net bad debt expenses according to Attachment 2 to the Settlement and agreed to a refund or additional recovery to be determined by evaluating the September 30, 2003, customer arrearages and amortizing the same over a three-year period. Laclede will withdraw from any challenge to the emergency rule.

The parties agreed to the depreciation rates presented in Attachment 3 to the Settlement. Excepting any subsequent judicial reversal in Case No. 01CV325280, Division I of the Circuit Court of Cole County, the parties have agreed to expense "net salvage" for ratemaking purposes. This is reflected in the revised tariff sheets filed in accordance with the Settlement.

The Settlement provides for two Accounting Authorization Orders related to replacement of certain service lines and cast iron mains and replacement or protection of steel mains as allowed in earlier Commission cases. However, the costs to survey and barhole buried fuel and copper service lines will no longer be

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deferred but instead will be expensed. The parties agree to reporting requirements for the deferrals under the Accounting Authorization Orders, their verification, and the procedure for Laclede to request consideration of the recovery of these costs. The costs may be deferred and booked as incurred by Laclede from July 31, 2001, until the earlier of the effective date of rates in Laclede's next general rate case or the beginning of a new deferral period granted by the Commission. The deferrals shall cease unless Laclede files a general rate relief request no later than two years after the effective date of a Commission order approving the Settlement.

The Settlement also fixes the balance of a previous deferral (\$2,755,688) and amortizes this amount in Laclede's cost of service with 1/10th of the balance recognized in this proceeding and the remainder over the next 9 years in equal installments.

The Settlement imputes \$3,000,000 of revenues (included in the rate increase) associated with release of contracted pipeline capacity and off-system gas sales. In return Laclede may retain 100% of any revenues derived from these transactions as long as the Settlement rates remain in effect. Laclede also agrees to withdraw these issues from consideration in Commission Case No. GT-2001-329.

The parties have agreed to use certain adjusted temperature data in the future from the weather station at Lambert St. Louis International Airport to establish Laclede's weather normal, unless, specific issues or adjustments are proposed within certain time frames to the adjusted data published by the National Oceanic and Atmospheric Administration. The parties agree to continue to confer and exchange information regarding the establishment of the weather normal for Laclede's service territory.

The parties have agreed that if the Settlement is accepted and approved by the Commission that tariff sheets in Case Number GT-2001-662 will be withdrawn or may be rejected by the Commission and the case closed.

The parties are not precluded from presenting weather mitigation clauses or alternative rate design proposals in future proceedings before the Commission. Laclede has agreed to evaluate and pursue the viability of a "fixed-bill" service option for customers for the 2002/2003 winter heating season by way of an agreement with a third party vendor. Laclede will keep Staff apprised of its efforts with bi-monthly updates starting January 31, 2002.

Laclede has agreed to develop and implement a customer "Weatherization Program" funded at an annual level of \$300,000 plus \$40,000 for administrative costs. The program will be implemented in conjunction with the input of the Staff and the Office of the Public Counsel within 90 days of the effective date of an order approving the settlement.

Laclede has agreed, if the Settlement is approved, to withdraw from Case No. GO-2002-175 related to the Commission's Cold Weather Rule.

The parties preserve various matters not specifically addressed in the Settlement, recite that the various agreements and stipulations are dependent upon approval of the Settlement, waive certain substantive and procedural rights and the rights of appeal upon approval of the Settlement, stipulate to the admission of all prefiled testimony, and agree that Staff may submit a memorandum explaining its rational for entering the Settlement.

Staff Suggestions in Support of Settlement:

Staff filed its Suggestions in Support of Stipulation and Agreement on November 27, 2001. Staff states that all of the parties have agreed that the Settlement presents a reasonable revenue increase and that the parties engaged in extensive negotiations for more than a month to obtain the Settlement. The Commission notes that the prepared written testimony and schedules filed in this case by the parties and the discovery conducted by the parties reflects weeks of work and hundreds of hours.

Staff's suggestions reflect its position for compromising various issues and notes where Staff's positions were adopted or were compromised. Staff describes the data presented on Attachment 1A as presenting very minimal class revenue shifts related to the \$11.985 million revenue increase and states that the revenue shifts were designed so that most classes had similar percentage increases when the service initiation charges were included in the revenue increase. Staff states that the annual increase for a typical space heating residential customer would be \$18.48 per year or about 2.3%. Staff noted that Laclede's proposed Weatherization Program was suggested by the Public Counsel and is similar to other successful programs implemented by Missouri utilities and will fund Community Action Programs already in place.

Motion for Expedited Approval of Tariff Sheets and Waiver of Ten-Day Effective Period:

On November 21, 2001, Laclede filed tariff sheets in this case (Tariff File No. 200200403) for implementing the Settlement and a motion requesting expedited approval of the tariff sheets and to waive standard ten-day effective dates. The tariff sheets have an issue date of November 21, 2001, and effective date of December 1, 2001. Laclede requested that the tariff sheets be put into effect as of December 1, 2001.

Laclede notes that in the Settlement the parties have agreed to an effective date of December 1, 2001, and that the tariff sheets filed on November 21 are identical in content to the specimen tariff sheets in Attachment 1 to the Settlement.

Laclede states that the proposed 2% increase presented by the tariff filing is dwarfed by a recent 30% decrease in rates resulting from the company's recent winter PGA filing. Swift Commission approval of the Settlement and proposed tariff sheets will provide Laclede with additional financial resources to maintain reliable and dependable service; prevent erosion of the anticipated value of the Settlement to Laclede that would occur if approval is delayed beyond the December 1, 2001 implementation agreed by the parties; allow prompt implementation of tariff provisions reflecting the Commission's Emergency Amendment to the Cold Weather Rule; and permit the timely development of new customer programs, including implementation of the Weatherization Program and development of fixed bill options.

Laclede stated that all parties have indicated no objection to the Commission granting the relief requested and have waived any requirement for a ten-day effective date.

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Commission Approval and Expedited Treatment:

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties. The Settlement reflects the result of extensive negotiations between adverse parties representing diverse interests. The stipulations and agreements presented in the Settlement demonstrate that the parties have resolved the issues presented to arrive at tariff rates and terms that are just and reasonable.

Laclede has presented a reasonable basis for expedited treatment and its motion shall be granted.

The Settlement, attached as Exhibit 1, shall be approved. The tariff sheets filed on November 21, 2001, to implement the Settlement shall be approved to be effective on December 1, 2001. The tariff sheets filed prior to November 21 in these cases shall be rejected.

IT IS THEREFORE ORDERED:

1. That the Unanimous Stipulation and Agreement filed on November 16, 2001, shall be incorporated in this order and is hereby approved and accepted in resolution of the issues presented in Case Nos. GR-2001-629 and GT-2001-662 (Exhibit 1, attached).
2. That the prefiled testimony of the parties relating to the issues resolved in the Unanimous Stipulation and Agreement shall be received into evidence.
3. That the Motion for Expedited Approval of Tariff Sheets on less than Thirty Days Notice and Notice of Waiver of Ten-Day Effective Date Period filed by Laclede Gas Company on November 21, 2001, is granted.
4. That the revised tariff sheets filed by Laclede Gas Company on April 20, 2001, in Case No. GT-2001-662, Tariff File No. 200101074, are rejected.
5. That the revised tariff sheets filed by Laclede Gas Company on May 18, 2001, in Case No. GR-2001-629, Tariff File No. 200101125, are rejected.
6. That the following tariff sheets, Tariff File No. 200200403, filed by Laclede Gas Company on November 21, 2001, in Case No. GR-2001-629, which are identical in content to the specimen tariff sheets contained in Attachment 1 to the Unanimous Stipulation and Agreement (Exhibit 1, attached), are hereby approved to become effective on December 1, 2001.

P.S.C. MO. No. 5

**P.S.C. MO. No. 5 Consolidated Fourth Revised Sheet No. 1-a
Cancelling P.S.C. MO. No. 5 Consolidated, Third Revised Sheet No. 1-a**

**P.S.C. MO. No. 5 Consolidated, Thirteenth Revised Sheet No. 2
Cancelling P.S.C. MO. No. 5 Consolidated, Twelfth Revised Sheet No. 2**

**P.S.C. MO. No. 5 Consolidated, Ninth Revised Sheet No. 3
Cancelling P.S.C. MO. No. 5 Consolidated, Eighth Revised Sheet No. 3**

**P.S.C. MO. No. 5 Consolidated, Twelfth Revised Sheet No. 4
Cancelling P.S.C. MO. No. 5 Consolidated, Eleventh Revised Sheet No. 4**

P.S.C. MO. No. 5 Consolidated, First Revised Sheet No. 4-a
Cancelling P.S.C. MO. No. 5 Consolidated, Original Sheet No. 4-a

P.S.C. MO. No. 5 Consolidated, Thirteenth Revised Sheet No. 5
Cancelling P.S.C. MO. No. 5 Consolidated, Twelfth Revised Sheet No. 5

P.S.C. MO. No. 5 Consolidated, Twelfth Revised Sheet No. 7
Cancelling P.S.C. MO. No. 5 Consolidated, Eleventh Revised Sheet No. 7

P.S.C. MO. No. 5 Consolidated, Fourteenth Revised Sheet No. 8
Cancelling P.S.C. MO. No. 5 Consolidated, Thirteenth Revised Sheet No. 8

P.S.C. MO. No. 5 Consolidated, Twelfth Revised Sheet No. 9
Cancelling P.S.C. MO. No. 5 Consolidated, Eleventh Revised Sheet No. 9

P.S.C. MO. No. 5 Consolidated, Sixth Revised Sheet No. 11
Cancelling P.S.C. MO. No. 5 Consolidated, Fifth Revised Sheet No. 11

P.S.C. MO. No. 5 Consolidated, Tenth Revised Sheet No. 21
Cancelling P.S.C. MO. No. 5 Consolidated, Ninth Revised Sheet No. 21

P.S.C. MO. No. 5 Consolidated, Tenth Revised Sheet No. 22
Cancelling P.S.C. MO. No. 5 Consolidated, Ninth Revised Sheet No. 22

P.S.C. MO. No. 5 Consolidated, Second Revised Sheet No. 31-a
Cancelling P.S.C. MO. No. 5 Consolidated, First Revised Sheet No. 31-a

P.S.C. MO. No. 5 Consolidated, Eighth Revised Sheet No. 34
Cancelling P.S.C. MO. No. 5 Consolidated, Seventh Revised Sheet No. 34

P.S.C. MO. No. 5 Consolidated, Ninth Revised Sheet No. R-2
Cancelling P.S.C. MO. No. 5 Consolidated, Eighth Revised Sheet No. R-2

P.S.C. MO. No. 5 Consolidated, Fourth Revised Sheet No. R-11
Cancelling P.S.C. MO. No. 5 Consolidated, Third Revised Sheet No. R-11

P.S.C. MO. No. 5 Consolidated, First Revised Sheet No. R-36
Cancelling P.S.C. MO. No. 5 Consolidated, Original Sheet No. R-36

P.S.C. MO. No. 5 Consolidated, Original Sheet No. R-36-a
Cancelling All Previous Schedules

P.S.C. MO. No. 5 Consolidated, First Revised Sheet No. R-41
Cancelling P.S.C. MO. No. 5 Consolidated, Original Sheet No. R-41

P.S.C. MO. No. 5 Consolidated, Original Sheet No. R-42
Cancelling All Previous Schedules

P.S.C. MO. No. 5 Consolidated, Original Sheet No. R-43
Cancelling All Previous Schedules

10 Mo. P.S.C. 3d

- 7. That this order shall become effective on December 1, 2001.
- 8. That Case No. GR-2001-629 shall be closed on December 9, 2001.
- 9. That Case No. GT-2001-662 shall be closed on December 9, 2001.

Simmons, Ch., Murray, Lumpe, Gaw and Forbis, CC., concur

Thornburg, Regulatory Law Judge

Editor's note: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

DIGEST OF REPORTS

OF THE

PUBLIC SERVICE COMMISSION

OF THE

STATE OF MISSOURI

LIST OF DIGEST TOPICS

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ACCOUNTING**I. IN GENERAL**

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- §4. Jurisdiction and powers of the State Commission
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- §6. Vouchers and receipts

II. DUTY TO KEEP PROPER ACCOUNTS

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- §8. Uniform accounts and rules
- §9. Methods of accounting generally

III. PARTICULAR ITEMS

- §10. Additions, retirements and replacements
- §11. Abandoned property
- §12. Capital account
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- §18. Financing costs
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- §21. Incomplete construction
- §22. Interest
- §23. Labor cost
- §23.1. Employee compensation
- §24. Liabilities
- §25. Maintenance, repairs and depreciation
- §26. Notes
- §27. Plant adjustment account
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- §30. Purchase price or original cost
- §31. Acquisition of property expenses
- §32. Rentals
- §33. Retirement account
- §34. Retirement of securities
- §35. Sinking fund
- §36. Securities

- §37. Supervision and engineering
- §38. Taxes
- §38.1. Book/tax timing differences
- §39. Welfare and pensions
- §39.1. OPEBS, Postretirement benefits other than pensions
- §40. Working capital and current assets
- §41. Expenses generally
- §42. Accounting Authority Orders
- §43. Financial Accounting Standards Board requirements

ACCOUNTING

I. IN GENERAL

II. DUTY TO KEEP PROPER ACCOUNTS

III. PARTICULAR ITEMS

§38. Taxes

Although the parties were not precluded from proposing different treatment in the future, the settlement allowed Laclede to “normalize” the income tax timing differences associated with the pension accounting and post-retirement benefits other than pensions—Laclede Gas Company 10 MPSC 3d 595.

§42. Accounting Authority Orders.

A third, successive Accounting Authority Order was not appropriate where a Company sought to defer infrastructure replacement costs and the record showed that infrastructure replacement would both require large capital investments by the Company and cause sizeable expenses to the Company over a course of several years, because these were not the sort of extraordinary and non-recurring costs that are appropriately deferred under an Accounting Authority Order—St. Louis County Water Company 10 MPSC 3d 56.

CERTIFICATES

I. IN GENERAL

- §1. Generally
- §2. Unauthorized operations and construction
- §3. Obligation of the utility

II. JURISDICTION AND POWERS

- §4. Jurisdiction and powers generally
- §5. Jurisdiction and powers of Federal Commissions
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of local authorities
- §8. Jurisdiction and powers over interstate operations
- §9. Jurisdiction and powers over operations in municipalities
- §10. Jurisdiction and powers over the organizations existing prior to the Public Service Commission law

III. WHEN A CERTIFICATE IS REQUIRED

- §11. When a certificate is required generally
- §12. Certificate from federal commissions
- §13. Extension and changes
- §14. Incidental services or operations
- §15. Municipal limits
- §16. Use of streets or public places
- §17. Resumption after service discontinuance
- §18. Substitution or replacement of facilities
- §19. Effect of general laws, franchises and licenses
- §20. Certificate as a matter of right

IV. GRANT OR REFUSAL OF CERTIFICATE OR PERMIT - FACTORS

- §21. Grant or refusal of certificate generally
 - §21.1. Public interest
 - §21.2. Technical qualifications of applicant
 - §21.3. Financial ability of applicant
 - §21.4. Economic feasibility of proposed service
- §22. Restrictions and conditions
- §23. Who may possess
- §24. Validity of certificate
- §25. Ability and prospects of success
- §26. Public safety
- §27. Charters and franchises
- §28. Contracts
- §29. Unauthorized operation or construction

- §30. Municipal or county action
- §31. Rate proposals
- §32. Competition or injury to competitor
- §33. Immediate need for the service
- §34. Public convenience and necessity or public benefit
- §35. Existing service and facilities

V. PREFERENCE BETWEEN RIVAL APPLICANTS - FACTORS

- §36. Preference between rival applicants generally
- §37. Ability and responsibility
- §38. Existing or past service
- §39. Priority of applications
- §40. Priority in occupying territory
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VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

- §42. Electric and power
- §43. Gas
- §44. Heating
- §45. Water
- §46. Telecommunications
- §46.1. Certificate of local exchange service authority
- §46.2. Certificate of interexchange service authority
- §46.3. Certificate of basic local exchange service authority
- §47. Sewers

VII. OPERATION UNDER TERMS OF THE CERTIFICATE

- §48. Operations under terms of the certificate generally
- §49. Beginning operation
- §50. Duration of certificate right
- §51. Modification and amendment of certificate generally

VIII. TRANSFER, MORTGAGE OR LEASE

- §52. Transfer, mortgage or lease generally
- §53. Consolidation or merger
- §54. Dissolution
- §55. Transferability of rights
- §55.1. Change of supplier
- §55.2. Territorial agreement
- §56. Partial transfer
- §57. Transfer of abandoned or forfeited rights
- §58. Mortgage of certificate rights
- §59. Sale of certificate rights

IX. REVOCATION, CANCELLATION AND FORFEITURE

- §60. Revocation, cancellation and forfeiture generally
- §61. Acts or omissions justifying revocation or forfeiture
- §62. Necessity of action by the Commission
- §63. Penalties

CERTIFICATES

IV. GRANT OR REFUSAL OF CERTIFICATE OR PERMIT - FACTORS

§21. Grant or refusal of certificate generally

The Commission granted a certificate of service authority to provide intrastate interexchange telecommunications services in the state of Missouri to Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance and Southwestern Bell Communications Services Inc., d/b/a SBC Long Distance—Southwestern Bell Communication Services 10 MPSC 3d 569.

The Commission granted a requested Certificate of Convenience and Necessity where the parties unanimously agreed to its issuance and the record showed that all statutory conditions were met—St. Louis County Water Company 10 MPSC 3d 89.

VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

§45. Water

The Commission granted the company's application to cancel its certificate of public convenience and necessity—Ozark Shores Water Company 10 MPSC 3d 497.

§46.2. Certificate of interexchange service authority

The Commission granted a certificate of service authority to provide intrastate interexchange telecommunications services in the state of Missouri to Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance and Southwestern Bell Communications Services Inc. d/b/a SBC Long Distance—Southwestern Bell Communication Services 10 MPSC 3d 569.

§47. Sewers

The Commission granted the company’s application to cancel its certificate of public convenience and necessity—Ozark Shores Water Company 10 MPSC 3d 497.

DEPRECIATION

I. IN GENERAL

- §1. Generally**
- §2. Right to allowance for depreciation**
- §3. Reports, records and statements**
- §4. Obligation of the utility**

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally**
- §6. Jurisdiction and powers of the State Commission**
- §7. Jurisdiction and powers of the Federal Commission**
- §8. Jurisdiction and powers of local authorities**

III. BASIS FOR CALCULATION

- §9. Generally**
- §10. Cost or value**
- §11. Property subject to depreciation**
- §12. Methods of calculation**
- §13. Depreciation rates to be allowed**
- §14. Rates or charges for service**

IV. FACTORS AFFECTING ANNUAL ALLOWANCE

- §15. Factors affecting annual allowance generally**
- §16. Life of enterprise**
- §17. Life of property**
- §18. Past depreciation**
- §19. Charges to maintenance and other accounts**
- §20. Particular methods and theories**
- §21. Experience**
- §22. Life of property and salvage**
- §23. Sinking fund and straight line**
- §24. Combination of methods**

V. RESERVES

- §25. Necessity
- §26. Separation between plant units
- §27. Amount
- §28. Ownership of fund
- §29. Investment and use
- §30. Earnings on reserve

VI. DEPRECIATION OF PARTICULAR UTILITIES

- §31. Electric and power
- §32. Gas
- §33. Heating
- §34. Telecommunications
- §35. Water

DEPRECIATION

III. BASIS FOR CALCULATION

§12. Methods of calculation

The Commission found that Laclede Gas Company failed to show that its depreciation calculation, with regard to net salvage was just and reasonable—Laclede Gas Company 10 MPSC 3d 361.

IV. FACTORS AFFECTING ANNUAL ALLOWANCE

§22. Life of property and salvage

The Commission found that Laclede Gas Company failed to show that its depreciation calculation, with regard to net salvage was just and reasonable—Laclede Gas Company 10 MPSC 3d 361.

VI. DEPRECIATION OF PARTICULAR UTILITIES

§32. Gas

The Commission found that Laclede Gas Company failed to show that its depreciation calculation, with regard to net salvage was just and reasonable—Laclede Gas Company 10 MPSC 3d 361.

The Commission found that Laclede Gas Company had not committed to removing its natural gas holders, that the company had already recovered its capital investment in the natural gas holders, and that there

was no interim net salvage value of the natural gas holders. Therefore, the Commission determined that it was not just and reasonable for current customers of the company to pay for the expense of removal when the ratepayers may receive no benefit from those payments—Laclede Gas Company 10 MPSC 3d 361.

§34. Telecommunications

The Commission directed the company to adopt the depreciation rates developed by the Staff of the Commission for use by small telecommunications companies. Staff’s recommended depreciation rates recover only the original capital cost of plant and exclude net salvage—Northeast Missouri Rural Telephone Company 10 MPSC 3d 275.

DISCRIMINATION

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Recovery of damages for discrimination**
- §4. Recovery of discriminatory undercharge**
- §5. Reports, records and statements**

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers of the State Commission**
- §7. Jurisdiction and powers of the Federal Commissions**
- §8. Jurisdiction and powers of the local authorities**

III. RATES

- §9. Competitor’s right to equal treatment**
- §10. Free service**
- §11. Inequality of rates**
- §12. Methods of eliminating discrimination**
- §13. Optional rates**
- §14. Rebates**
- §15. Service charge, meter rental or minimum charge**
- §16. Special rates**
- §17. Rates between localities**
- §18. Concessions**

IV. RATES BETWEEN CLASSES

- §19. Bases for classification and differences
- §20. Right of the utility to classify
- §21. Reasonableness of classification

V. RATES AND CHARGES OF PARTICULAR UTILITIES

- §22. Electric and power
- §23. Gas
- §24. Heating
- §25. Telecommunications
- §26. Sewer
- §27. Water

VI. SERVICE IN GENERAL

- §28. Service generally
- §29. Abandonment and discontinuance
- §30. Discrimination against competitor
- §31. Equipment, meters and instruments
- §32. Extensions
- §33. Preference during shortage of supply
- §34. Preferences to particular classes or persons

VII. SERVICE BY PARTICULAR UTILITIES

- §35. Electric and power
- §36. Gas
- §37. Heating
- §38. Sewer
- §39. Telecommunications
- §40. Water

DISCRIMINATION

No cases in this volume involved the question of discrimination.

ELECTRIC**I. IN GENERAL**

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

III. OPERATIONS

- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions

- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §48.1 Qualifying facilities
- §49. Records and statements

ELECTRIC

I. IN GENERAL

§1. Generally

The Commission granted UtiliCorp United Inc., d/b/a Missouri Public Service, a variance for good cause from the affiliate transactions rule as set forth in Commission Rule 4 CSR 240-20.015(2)(A)(1). The company requested the variance for the purpose of performing in accordance with the Service Agreement No. 2 with MEP Pleasant Hill, L.L.C.—UtiliCorp United 10 MPSC 3d 339.

The Commission approved a credit sharing in the amount of \$28,000,000, to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan, upon finding that the proposed sharing credit amount is reasonable—Union Electric Company 10 MPSC 3d 211.

The Commission rejected proposed tariff sheets that were designed to raise the company's current rates by \$3,562,983 on an annual basis. The company filed the proposed tariffs in order to correct an error in the data used in the company's recently decided rate case, ER-2001-299. The company had not filed a request for rehearing in that rate case. The Commission determined that the Report and Order in the rate case was final and not appealable. The Commission also found that the rates in

the company's current tariff were lawful and reasonable and should continue in force—Empire District Electric 10 MPSC 3d 566.

The Commission rejected proposed tariff sheets designed to implement an annual general rate increase for electric service provided to retail customers in the Missouri service area of the company. The company requested an annual increase in its revenues of approximately \$41,467,926. The Commission authorized the company to file proposed tariff sheets in compliance with the order, which would result in a smaller increase in annual revenues and incorporate an Interim Energy Charge on customer bills—Empire District Electric 10 MPSC 3d 463.

The Commission approved a credit sharing in the amount of \$28,000,000, to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan, upon finding that the proposed sharing credit amount is reasonable—Union Electric Company 10 MPSC 3d 211.

§2. Obligation of the utility

The Commission granted Union Electric Company d/b/a AmerenUE a variance of Commission Rule 4 CSR 240 10.030(28), to continue its sampled meter testing program, implementing the American National Standard Institute Sampling Procedures and Tables for Inspection by Attributes and by Variables (ANSI Standards) as a basis for its sample meter testing procedure—Union Electric Company 10 MPSC 3d 438.

§4. Transfer, lease and sale

The Commission accepted the Stipulation and Agreement of the parties that the reorganization of Kansas City Power & Light Company as the subsidiary of an unregulated holding company, which also owns unregulated subsidiaries, including one intended to generate power for sale on the wholesale market, was not detrimental to the public interest—Kansas City Power & Light 10 MPSC 3d 394.

§4.1. Change of suppliers

In a proceeding under Section 386.800, where the record showed that a municipally-owned electric utility had misled the public prior to an annexation election as to whether an established rural electric cooperative would be permitted to continue to serve its existing customers in the annexed area and both utilities were otherwise equally capable of serving the area in question, the Commission concluded that forced sale proposed by the municipally-owned electric utility was not in the public interest—City of Rolla 10 MPSC 3d 127.

II. JURISDICTION AND POWERS

§9. Jurisdiction and Powers of the State Commission

The Commission rejected The Office of the Public Counsel's argument that the Commission does not have jurisdiction to decide a tariff case that involves less than the entire company. Public Counsel argued that Chapter 393 and Commission Rules require a rate case to include the entire company, not just a division of it. But §393.150 permits the Commission to hear any schedule stating a new rate or charge—Missouri Public Service 10 MPSC 3d 510.

§11. Territorial agreements

The Commission found that it had jurisdiction over the territorial agreement between an electric cooperative and a regulated electric utility pursuant to subsection 394.312.4, RSMo—Empire District Electric 10 MPSC 3d 358.

III. OPERATIONS

§14. Rules and regulations

The Commission granted UtiliCorp United Inc., d/b/a Missouri Public Service, a variance for good cause from the affiliate transactions rule as set forth in Commission Rule 4 CSR 240 20.015(2)(A)(1), for the purpose of performing in accordance with its Service Agreement No. 2 with MEP Pleasant Hill, L.L.C.—UtiliCorp United 10 MPSC 3d 339.

§19. Discrimination

The Commission rejected The Office of Public Counsel's argument that a company that files a tariff for less than the entire company has committed discrimination. The Commission finds that Section 393.130 prohibits only "undue" discrimination; a company may legally charge customers differently due to the costs involved in serving them—Missouri Public Service 10 MPSC 3d 510.

§20. Rates

The Commission rejected proposed tariff sheets designed to implement an annual general rate increase of approximately \$41,467,926, for electric service provided to retail customers in the Missouri service area of the company. The Commission authorized the company to file proposed tariff sheets in compliance with the order, which would result in a smaller increase in annual revenues and incorporate an Interim Energy Charge on customer bills—Empire District Electric 10 MPSC 3d 463.

The Commission rejected The Office of Public Counsel's contention that the Commission could not set different rates for a utility's customers. The Commission has authority to approve of tariffs that affect only one division of the company, assuming such tariffs do not unduly discriminate against them—Missouri Public Service 10 MPSC 3d 510.

With a pending rate case before the Commission, the request for immediate, interim rate relief must be supported by a showing of negative returns in the period before the rate case is concluded, a showing that there is a risk that the ability to provide safe and adequate service will be impaired or a showing of an inability to finance the operations of the company—Empire District Electric 10 MPSC 3d 124.

The Commission approved a credit sharing in the amount of \$28,000,000, to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan, upon finding that the proposed sharing credit amount is reasonable—Union Electric Company 10 MPSC 3d 211.

The Commission rejected proposed tariff sheets that were designed to raise the company's current rates by \$3,562,983 on an annual basis in order to correct an error in the data used in the company's recently decided rate case, ER 2001 299. The Commission determined that the the rates in the company's current tariff were lawful and reasonable and should continue in force—Empire District Electric 10 MPSC 3d 566.

§21. Refunds

The Commission approved a credit sharing in the amount of \$28,000,000, to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan, upon finding that the proposed sharing credit amount is reasonable—Union Electric Company 10 MPSC 3d 211.

§22. Revenue

The Commission rejected proposed tariff sheets designed to implement an annual general rate increase of approximately \$41,467,926, for electric service provided to retail customers in the Missouri service area of the company. The Commission authorized the company to file proposed tariff sheets in compliance with the order, which would result in a smaller increase in annual revenues and incorporate an Interim Energy Charge on customer bills—Empire District Electric 10 MPSC 3d 463.

§23. Return

Commission waived requirement for individual metering and allowed master metering for elderly housing development where owner would pay utility bills and subsidize services—Union Electric Company 10 MPSC 3d 365.

§29. Rate of return

Commission waived requirement for individual metering and allowed master metering for elderly housing development where owner would pay utility bills and subsidize services—Union Electric Company 10 MPSC 3d 365.

The Commission rejected the electric company's tariff designed to produce an annual increase in the company's revenues of approximately \$41,467,926. The order authorized the company to file tariff sheets designed to produce a smaller increase in permanent revenues and allowed the company to incorporate an Interim Energy Charge on customer bills. The Interim Energy Charge will be in effect for two years and is subject to refund with interest to customers of the company—Empire District Electric 10 MPSC 3d 463.

§31. Equipment

The Commission granted Union Electric Company d/b/a AmerenUE a variance of Commission Rule 4 CSR 240 10.030(28), to continue its sampled meter testing program, implementing the American National Standard Institute Sampling Procedures and Tables for Inspection by Attributes and by Variables (ANSI Standards) as a basis for its sample meter testing procedure—Union Electric Company 10 MPSC 3d 438.

§32. Safety

The Commission accepted the Stipulation and Agreement of the parties as resolution of the investigation into an explosion that occurred on February 17, 1999, at a generating plant operated by Kansas City Power & Light Company, an electric corporation subject to Commission jurisdiction as a public utility. The explosion, at approximately 12:30 a.m. at Hawthorn Station's Boiler No. 5, destroyed the boiler and other structures at the plant; no person was seriously injured as a result of the explosion. The investigation concluded that the explosion was caused by the unintended introduction of natural gas into the boiler due to the malfunction of the boiler management system due to its flooding earlier that day by a wastewater overflow—Kansas City Power & Light 10 MPSC 3d 372.

§33. Maintenance

The Commission granted Union Electric Company d/b/a AmerenUE a variance of Commission Rule 4 CSR 240 10.030(28), to continue its sampled meter testing program, implementing the American National Standard Institute Sampling Procedures and Tables for Inspection by Attributes and by Variables (ANSI Standards) as a basis for its sample meter testing procedure—Union Electric Company 10 MPSC 3d 438.

Commission waived requirement for individual metering and allowed master metering for elderly housing development where owner would pay utility bills and subsidize services—Union Electric Company 10 MPSC 3d 365

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

- §1. Generally**
- §2. Jurisdiction and powers**
- §3. Judicial notice; matters outside the record**
- §4. Presumption and burden of proof**
- §5. Admissibility**
- §6. Weight, effect and sufficiency**
- §7. Competency**
- §8. Stipulation**

II. PARTICULAR KINDS OF EVIDENCE

- §9. Particular kinds of evidence generally**
- §10. Admissions**
- §11. Best and secondary evidence**
- §12. Depositions**
- §13. Documentary evidence**
- §14. Evidence by Commission witnesses**
- §15. Opinions and conclusions; evidence by experts**
- §16. Petitions, questionnaires and resolutions**
- §17. Photographs**
- §18. Record and evidence in other proceedings**
- §19. Records and books of utilities**
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- §21. Views**

III. PRACTICE AND PROCEDURE

- §22. Parties
- §23. Notice and hearing
- §24. Procedures, evidence and proof
- §25. Pleadings and exhibits
- §26. Burden of proof
- §27. Finality and conclusiveness
- §28. Arbitration
- §29. Discovery
- §30. Settlement procedures
- §31. Mediator
- §32. Confidential evidence

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

§1. Generally

A Commission order is final, and cannot be collaterally attacked by the filing of a new pleading addressing the same issues unless a change of circumstances has occurred. AmerenUE filed a motion to stay the expiration of the Second EARP beyond its June 30, 2001 expiration date, and requesting a stay of Staff’s filing of a proposed rate reduction, as previously authorized by Commission order. No change of circumstance exists to justify the Commission’s reconsideration of its earlier order, and AmerenUE’s motion is barred as a collateral attack—Union Electric Company 10 MPSC 3d 380.

A document filed with information designated as proprietary must comply with the Commission definition of Proprietary Information as stated in Commission Rule 4 CSR 240 2.085 and in the Protective Order that has been issued for that case. AmerenUE’s motion did not comply with the rule or the protective order, and was therefore, declassified as proprietary information and reclassified as an open record—Union Electric Company 10 MPSC 3d 380.

Commission established case to facilitate Staff investigation of emergency preparedness and security of facilities by public utilities and to receive Staff’s report—Investigation-Public Utility Emergency Preparedness 10 MPSC 3d 550.

The doctrine of laches acts to bar a claim filed so late that its delay works to the disadvantage or injury of the other parties. AmerenUE's motion, filed less than five working days before the expiration of the Second EARP, requesting stay of the expiration of the Second EARP, and a stay of Staff's authorized earnings investigation on July 1, 2001, was not reasonable or explained sufficiently to justify the lack of notice or real opportunity to respond to the motion. Therefore, AmerenUE's emergency motion may be barred by laches if it were not barred by Section 386.550, RSMo 2000—Union Electric Company 10 MPSC 3d 380.

§2. Jurisdiction and powers

Under Section 392.230(3) RSMo, the Commission has the discretionary authority to suspend, for 120 days plus six months, the effective date of a tariff for a new rate, rental, or charge. The Commission finds that, in order to allow more time to study the effect of the proposed tariff, it should be suspended under this statute—AT&T 10 MPSC 3d 440.

Commission established case to facilitate Staff investigation of emergency preparedness and security of facilities by public utilities and to receive Staff's report—Investigation-Public Utility Emergency Preparedness 10 MPSC 3d 550.

§4. Presumption and burden of proof

In a proceeding under Section 386.800, the municipally-owned electric utility has the burden of proof—City of Rolla 10 MPSC 3d 127.

Under the pleading presenting the stock purchase agreement effectively accomplishing a sale of assets for the Commission's approval, the applicants assert that the transaction presented will not be detrimental to the public. Therefore, they have the burden of proving that assertion. *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. banc 1991); see also *Dycus v. Cross*, 869 S.W.2d 745 (Mo. banc 1994). While applicants must prove that the transaction is not detrimental to the public, other parties have asserted that the merger is detrimental in one or more specific areas. The burden of proof is never shifted; however, the burden of going forward with evidence may shift if a prima facie case is made. *Anchor Centre Partners* at 30. Therefore, the parties asserting that the transaction is detrimental to the public in a particular way have the burden of going forward by presenting sufficient evidence to support their particular assertions—Gateway Pipeline Company 10 MPSC 3d 520.

Under Section 392.230(3) RSMo, the Commission has the discretionary authority to suspend, for 120 days plus six months, the effective date of

a tariff for a new rate, rental, or charge. The Commission finds that, in order to allow more time to study the effect of the proposed tariff, it should be suspended under this statute—AT&T 10 MPSC 3d 440.

In a proceeding under Section 386.800, the municipally-owned electric utility has the burden of proof—City of Rolla 10 MPSC 3d 127.

§8. Stipulation

The Commission approved a unanimous stipulation and agreement whereby Laclede Gas Company was allowed a rate increase of 2.14% or \$11,985,000, plus a new service initiation fee that provided \$3,100,000—Laclede Gas Company 10 MPSC 3d 595.

The Commission made certain interim rates permanent in accordance with the parties' stipulation. The Commission found the stipulation reasonable and in the public interest. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing—IAMO Telephone Company 10 MPSC 3d 71.

The Commission made certain interim rates permanent in accordance with the parties' stipulation. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing—KLM Telephone Company 10 MPSC 3d 84.

The Commission made certain interim rates permanent in accordance with the parties' stipulation. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing—Holway Telephone Company 10 MPSC 3d 86.

The Commission made certain interim rates permanent in accordance with the parties' stipulation. The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing—Peace Valley Telephone Company 10 MPSC 3d 88.

III. PRACTICE AND PROCEDURE

§23. Notice and hearing

The Commission concluded that the territorial agreement between the regulated electric utility and the electric cooperative was not detrimental to the public interest and should be approved—Empire District Electric 10 MPSC 3d 358.

The Commission ruled that the Missouri Independent Telephone Group, which are small incumbent local exchange companies, had an interest too remote in the interconnection agreement to have a property interest, and therefore were not entitled to the due process of law guarantee of the right to be heard. Nevertheless, the ILECs did receive actual notice in sufficient time to advance their arguments before the Commission—AT&T, TCG St. Louis, TCG KC 10 MPSC 3d 455.

§24. Procedures, evidence and proof

A document filed with information designated as proprietary must comply with the Commission definition of Proprietary Information as stated in Commission Rule 4 CSR 240 2.085 and in the Protective Order that has been issued for that case. AmerenUE's motion did not comply with the rule or the protective order, and was therefore, declassified as proprietary information and reclassified as an open record—Union Electric Company 10 MPSC 3d 380.

A Commission order is final, and cannot be collaterally attacked by the filing of a new pleading addressing the same issues unless a change of circumstances has occurred. AmerenUE filed a motion to stay the expiration of the Second EARP beyond its June 30, 2001 expiration date, and requesting a stay of Staff's filing of a proposed rate reduction, as previously authorized by Commission order. No change of circumstance exists to justify the Commission's reconsideration of its earlier order, and AmerenUE's motion is barred as a collateral attack—Union Electric Company 10 MPSC 3d 380.

The Commission found that Laclede Gas Company failed to show that its depreciation calculation, with regard to net salvage was just and reasonable—Laclede Gas Company 10 MPSC 3d 361.

The doctrine of laches acts to bar a claim filed so late that its delay works to the disadvantage or injury of the other parties. AmerenUE's motion, filed less than five working days before the expiration of the Second EARP, requesting stay of the expiration of the Second EARP, and a stay of Staff's authorized earnings investigation on July 1, 2001, was not reasonable or explained sufficiently to justify the lack of notice or real opportunity to respond to the motion. Therefore, AmerenUE's emergency motion may be barred by laches if it were not barred by Section 386.550, RSMo 2000—Union Electric Company 10 MPSC 3d 380.

§25. Pleadings and exhibits

A document filed with information designated as proprietary must comply with the Commission definition of Proprietary Information as stated in

Commission Rule 4 CSR 240 2.085 and in the Protective Order that has been issued for that case. AmerenUE's motion did not comply with the rule or the protective order, and was therefore, declassified as proprietary information and reclassified as an open record—Union Electric Company 10 MPSC 3d 380.

§26. Burden of proof

The Commission ruled that UtiliCorp has the burden of putting on competent and substantial evidence to support its contention that the Commission should approve of tariffs that charge different rates according to divisions within the company—Missouri Public Service 10 MPSC 3d 510.

§27. Finality and conclusiveness

A Commission order is final, and cannot be collaterally attacked by the filing of a new pleading addressing the same issues unless a change of circumstances has occurred. AmerenUE filed a motion to stay the expiration of the Second EARP beyond its June 30, 2001 expiration date, and requesting a stay of Staff's filing of a proposed rate reduction, as previously authorized by Commission order. No change of circumstance exists to justify the Commission's reconsideration of its earlier order, and AmerenUE's motion is barred as a collateral attack—Union Electric Company 10 MPSC 3d 380.

The Commission denied requests for rehearing filed by various parties because "sufficient reason" for rehearing did not appear in the applications—Mark Twain Rural Telephone Company 10 MPSC 3d 110.

§28. Arbitration

The Commission rejected the Missouri Independent Telephone Group's request to intervene in an arbitrated interconnection agreement. The Commission found that MITG was not a necessary and indispensable party. The Commission has discretion to allow intervention to parties who are not necessary and indispensable. However, the Commission could not grant intervention and rule on the arbitrated agreement within the thirty-day statutory deadline—AT&T, TCG St. Louis, TCG KC 10 MPSC 3d 455.

§30. Settlement procedures

The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing. The Commission reviewed the stipulation and agreement, found it reasonable and in the public interest, and approved it—KLM Telephone Company 10 MPSC 3d 84.

The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing. The Commission reviewed the stipulation and agreement, found it reasonable and in the public interest, and approved it—IAMO Telephone Company 10 MPSC 3d 71.

The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing. The Commission reviewed the stipulation and agreement, found it reasonable and in the public interest, and approved it—Holway Telephone Company 10 MPSC 3d 86.

The Commission treated the nonunanimous stipulation and agreement as unanimous after an intervenor failed to request a hearing. The Commission reviewed the stipulation and agreement, found it reasonable and in the public interest, and approved it—Peace Valley Telephone Company 10 MPSC 3d 88.

§32. Confidential evidence

A document filed with information designated as proprietary must comply with the Commission definition of Proprietary Information as stated in Commission Rule 4 CSR 240 2.085 and in the Protective Order that has been issued for that case. AmerenUE’s motion did not comply with the rule or the protective order, and was therefore, declassified as proprietary information and reclassified as an open record—Union Electric Company 10 MPSC 3d 380.

EXPENSE

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Financing practices
- §4. Apportionment
- §5. Valuation
- §6. Accounting

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions

- §9. Jurisdiction and powers of local authorities

III. EXPENSES OF PARTICULAR UTILITIES

- §10. Electric and power
- §11. Gas
- §12. Heating
- §13. Telecommunications
- §14. Water
- §15. Sewer

IV. ASCERTAINMENT OF EXPENSES

- §16. Ascertainment of expenses generally
- §17. Extraordinary and unusual expenses
- §18. Comparisons in absence of evidence
- §19. Future expenses
- §20. Methods of estimating
- §21. Intercompany costs or dealings

V. REASONABLENESS OF EXPENSE

- §22. Reasonableness generally
- §23. Comparisons to test reasonableness
- §24. Test year and true up

VI. PARTICULAR KIND OF EXPENSE

- §25. Particular kinds of expenses generally
- §26. Accidents and damages
- §27. Additions and betterments
- §28. Advertising, promotion and publicity
- §29. Appraisal expense
- §30. Auditing and bookkeeping
- §31. Burglary loss
- §32. Casualty losses and expenses
- §33. Capital amortization
- §34. Collection fees
- §35. Construction
- §36. Consolidation expense
- §37. Depreciation
- §38. Deficits under rate schedules
- §39. Donations
- §40. Dues
- §41. Employee's pension and welfare
- §42. Expenses relating to property not owned
- §43. Expenses and losses of subsidiaries or other departments

EXPENSE

- §44. Expenses of non-utility business
- §45. Expenses relating to unused property
- §46. Expenses of rate proceedings
- §47. Extensions
- §48. Financing costs and interest
- §49. Franchise and license expense
- §50. Insurance and surety premiums
- §51. Legal expense
- §52. Loss from unprofitable business
- §53. Losses in distribution
- §54. Maintenance and depreciation; repairs and replacements
- §55. Management, administration and financing fees
- §56. Materials and supplies
- §57. Purchases under contract
- §58. Office expense
- §59. Officers' expenses
- §60. Political and lobbying expenditures
- §61. Payments to affiliated interests
- §62. Rentals
- §63. Research
- §64. Salaries and wages
- §65. Savings in operation
- §66. Securities redemption or amortization
- §67. Taxes
- §68. Uncollectible accounts
- §69. Administrative expense
- §70. Engineering and superintendence expense
- §71. Interest expense
- §72. Preliminary and organization expense
- §73. Expenses incurred in acquisition of property
- §74. Demand charges
- §75. Expenses incidental to refunds for overcharges
- §76. Matching revenue/expense/rate base
- §77. Adjustments to test year levels
- §78. Isolated adjustments

EXPENSE

No cases in this volume involved the question of expense.

GAS

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Abandonment or discontinuance
- §5. Liability for damages
- §6. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

III. CONSTRUCTION AND EQUIPMENT

- §10. Construction and equipment generally
- §11. Leakage, shrinkage and waste
- §12. Location
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- §15. Maintenance
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IV. OPERATION

- §17. Operation generally
- §17.1. Purchased Gas Adjustment (PGA)
- §17.2. Purchased Gas-incentive mechanism
- §18. Rates
- §19. Revenue
- §20. Return
- §21. Service
- §22. Weatherization
- §23. Valuation
- §24. Accounting
- §25. Apportionment
- §26. Restriction of service
- §27. Depreciation
- §28. Discrimination
- §29. Costs and expenses
- §30. Reports, records and statements
- §31. Interstate operation
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- §33. Billing practices
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VI. PARTICULAR KIND OF EXPENSES

- §42. Particular kinds of expenses generally
- §43. Accidents and damages
- §44. Additions and betterments
- §45. Advertising, promotion and publicity
- §46. Appraisal expense
- §47. Auditing and bookkeeping
- §48. Burglary loss
- §49. Casualty losses and expenses
- §50. Capital amortization
- §51. Collection fees
- §52. Construction
- §53. Consolidation expense
- §54. Deprecation
- §55. Deficits under rate schedules
- §56. Donations
- §57. Dues
- §58. Employee's pension and welfare
- §59. Expenses relating to property not owned
- §60. Expenses and losses of subsidiaries or other departments
- §61. Expenses of non-utility business
- §62. Expenses relating to unused property
- §63. Expenses of rate proceedings
- §64. Extensions
- §65. Financing costs and interest
- §66. Franchise and license expense
- §67. Insurance and surety premiums
- §68. Legal expense
- §69. Loss from unprofitable business
- §70. Losses in distribution
- §71. Maintenance and depreciation; repairs and replacements

- §72. Management, administration and financing fees
- §73. Materials and supplies
- §74. Purchases under contract
- §75. Office expense
- §76. Officers' expenses
- §77. Political and lobbying expenditures
- §78. Payments to affiliated interests
- §79. Rentals
- §80. Research
- §81. Salaries and wages
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- §83. Securities redemption or amortization
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- §87. Engineering and superintendence expense
- §88. Interest expense
- §89. Preliminary and organization expense
- §90. Expenses incurred in acquisition of property
- §91. Demand charges
- §92. Expenses incidental to refunds for overcharges

GAS

I. IN GENERAL

§1. Generally

Laclede's Gas Supply Incentive Plan allowed to expire after Commission determined that the GSIP did not properly balance ratepayer and shareholder interests—Laclede Gas Company 10 MPSC 3d 485.

The Commission denied Staff's motion to suspend the company's tariff and instead approved the proposed tariff filing. Staff had requested that the Commission suspend the tariff pending additional study and evaluation. The proposed tariff was designed to reduce the Required Price Protection Volume percentages in the company's Experimental Price Stabilization Program. The Commission found that delaying the implementation of the tariff as requested by Staff was likely to threaten the viability of the Experimental Price Stabilization Program. The Commission also noted that the program would terminate on September 30, 2001—Laclede Gas Company 10 MPSC 3d 239.

The company filed proposed tariff sheets that purported to implement the Commission's modifications to the Experimental Price Stabilization Program. The Commission rejected the proposed tariff sheets, finding

that they were not compliant with the Commission's order as they went beyond the Commission's directions—Laclede Gas Company 10 MPSC 3d 210.

The Commission denied the company's request for a variance from its approved tariff sheets regarding the treatment within the Purchased Gas Adjustment of certain federal refunds and unauthorized use charge collections. Instead of refunding the money to the customers as provided for by the company's tariff, the company sought to assign these moneys to a specified charity to assist low-income customers in the company's service territory who were having difficulty paying their gas bills. The Commission found that Missouri law prohibited the Commission from approving the requested variance—Missouri Gas Energy 10 MPSC 3d 100.

The Commission established this case to investigate the process for the recovery of natural gas commodity cost increases by local distribution companies from their customers. The Commission received applications to serve on the task force from numerous entities and individuals. The Commission allowed each entity to have one task force member, and each individual requesting to participate was also made a task force member—Natural Gas Commodity Price Task Force 10 MPSC 3d 147.

§2. Obligation of the utility

The Commission re-opened this proceeding for the limited purpose of directing the disposition of the excess funds collected during AmerenUE's pilot weatherization program, and ordered AmerenUE to pay such excess funds to social service agencies to fund additional weatherization work—Union Electric Company 10 MPSC 3d 348.

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company, now known as Atmos Energy Corporation, to continue its meter sampling program for testing and replacement of meter equipment until December 31, 2001—Associated Natural Gas 10 MPSC 3d 206.

§6. Transfer, lease and sale

The Commission placed various conditions related to safety, operations, regulatory jurisdiction and financial reporting with approval of a sale of assets through a stock purchase agreement—Gateway Pipeline Company 10 MPSC 3d 520.

The Commission found that it was not detrimental to the public interest for Laclede Gas Company to restructure into a holding company, a regulated utility company, and unregulated subsidiaries as stipulated by the parties—Laclede Gas Company 10 MPSC 3d 406.

Pursuant to Commission Rule 4 CSR 240-2.060(7) and/or (12), the applicants must show why the proposed transaction is not detrimental to the public interest. The right to sell property is an important incident of the ownership thereof and “[a] property owner should be allowed to sell his property unless it would be detrimental to the public.” *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). “The obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility.” *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). To that end, the Commission has previously considered such factors as the applicant’s experience in the utility industry; the applicant’s history of service difficulties; the applicant’s general financial health and ability to absorb the proposed transaction; and the applicant’s ability to operate the asset safely and efficiently. See, *In the Matter of the Joint Application of Missouri Gas Energy et al.*, Case No. GM-94-252 (*Report and Order*, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220—Gateway Pipeline Company 10 MPSC 3d 520.

Under Section 393.190(1) no gas corporation may sell or otherwise dispose of any part of its works or system nor by any means, direct or indirect, merge or consolidate such works or system with any other corporation without first obtaining the order of the Commission authorizing it to do so. In this case Seller, a regulated public utility, is selling its wholly owned affiliate that in turn owns two Missouri regulated public utility companies that each own a state regulated intrastate gas transmission pipeline. Seller is effectively selling part of its system by selling its wholly owned subsidiaries—Gateway Pipeline Company 10 MPSC 3d 520.

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers of the State Commission

The Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the Statutes and powers reasonably incidental thereto. *State ex rel. and to Use of Kansas City Power & Light Company v. Buzard*, 168 S.W.2d 1044, (Mo. Banc 1943) —Gateway Pipeline Company 10 MPSC 3d 520.

Under Section 386.250(1) and (5), RSMo, the Commission has jurisdic-

tion extending to the distribution of natural gas within the state and to all public utility corporations subject to the Public Service Commission law—Gateway Pipeline Company 10 MPSC 3d 520.

Seller in the agreement presented for the Commission's approval is both a gas and an electrical corporation under Section 386.020, RSMo. Thus, seller is a public utility and is subject to the jurisdiction of the Commission—Gateway Pipeline Company 10 MPSC 3d 520.

Under Section 393.190(1), RSMo, no gas corporation may sell or otherwise dispose of any part of its works or system nor by any means, direct or indirect, merge or consolidate such works or system with any other corporation without first obtaining the order of the Commission authorizing it to do so—Gateway Pipeline Company 10 MPSC 3d 520.

Seller is a regulated public utility, selling its wholly owned affiliate that in turn owns two Missouri regulated public utility companies that each own a state regulated intrastate gas transmission pipeline. Seller is effectively selling part of its system by selling its wholly owned subsidiaries—Gateway Pipeline Company 10 MPSC 3d 520.

In this case the Seller is a regulated public utility corporation. The subsidiaries are also regulated public utilities and are wholly owned and controlled by Seller through a wholly owned affiliate. The transaction presents the sale of part of Seller's system and therefore the Commission has jurisdiction and a duty to review the transaction and determine whether it may be approved—Gateway Pipeline Company 10 MPSC 3d 520.

The company requested a variance from its tariff so that it could assign certain federal refund and unauthorized use charge collections to a specified charity instead of refunding the money to the customers as provided for by the company's tariff. The Commission found that the requested variance was prohibited by Missouri law—Missouri Gas Energy 10 MPSC 3d 100.

III. CONSTRUCTION AND EQUIPMENT

§13. Additions and betterments

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company, now known as Atmos Energy Corporation, to continue its meter sampling program for testing and replacement of meter equipment until December 31, 2001—Associated Natural Gas 10 MPSC 3d 206.

§15. Maintenance

The Commission granted a variance of Commission rule 4 CSR 240 10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company, now known as Atmos Energy Corporation, to continue its meter sampling program for testing and replacement of meter equipment until December 31, 2001—Associated Natural Gas 10 MPSC 3d 206.

§16. Safety

The Commission specifically ordered compliance with safety requirements as a condition for approval of sale of intrastate gas pipeline companies—Gateway Pipeline Company 10 MPSC 3d 520.

IV. OPERATION**§17. Operation generally**

The Commission re-opened this proceeding for the limited purpose of directing the disposition of the excess funds collected during AmerenUE's pilot weatherization program, and ordered AmerenUE to pay such excess funds to social service agencies to fund additional weatherization work—Union Electric Company 10 MPSC 3d 348.

The Commission denied Staff's motion to suspend the company's tariff and instead approved the proposed tariff filing. The proposed tariff was designed to reduce the Required Price Protection Volume percentages in the company's Experimental Price Stabilization Program from 70% to 40% for the upcoming winter in order to permit a corresponding reduction in the program's Target Strike Price and Catastrophic Price Level. The Commission found that delaying the implementation of the tariff as requested by Staff was likely to threaten the viability of the Experimental Price Stabilization Program. The Commission also noted that the program would terminate on September 30, 2001—Laclede Gas Company 10 MPSC 3d 239.

The Commission established this case to investigate the process for the recovery of natural gas commodity cost increases by local distribution companies from their customers. The Commission received applications to serve on the task force from numerous entities and individuals. The Commission allowed each entity to have one task force member, and each individual requesting to participate was also made a task force member—Natural Gas Commodity Price Task Force 10 MPSC 3d 147.

The \$8,847,088 revenue increase granted Missouri Gas Energy in the Commission's Report and Order issued January 22, 1997, and its subsequent orders, must be applied to the customer classes as an equal percentage increase (i.e., 68.22 percent for Residential; 0.01 percent for Un-metered Gas Lights; 21.22 percent for Small General Service; 2.65 percent for Large General Service; and 7.90 percent for Large Volume Service)—Missouri Gas Energy 10 MPSC 3d 1.

§17.1. Purchased Gas Adjustment (PGA)

The Commission suspended tariffs filed by Laclede Gas Company, Missouri Gas Energy, a division of Southern Union Company, Atmos Energy Corporation d/b/a United Cities Gas Company and Greeley Gas Company, and Missouri Public Service and St. Joseph Light and Power, divisions of UtiliCorp United Inc. designed to recover a portion of each applicant's uncollectibles expense through its Purchased Gas Adjustment process—Missouri Natural Gas Distribution Companies 10 MPSC 3d 551.

The Commission denied the company's request for a variance from its approved tariff sheets regarding the treatment within the Purchased Gas Adjustment of certain federal refunds and unauthorized use charge collections. Instead of refunding the money to the customers as provided for by the company's tariff, the company sought to assign these moneys to a specified charity to assist low-income customers in the company's service territory who were having difficulty paying their gas bills. The Commission found that Missouri law prohibited the Commission from approving the requested variance—Missouri Gas Energy 10 MPSC 3d 100.

Tariff number 200200348, submitted in case number GR-2001-461 on November 5, 2001, by Missouri Public Service Company, a division of UtiliCorp United Inc., is approved on an interim basis, subject to refund, for service rendered on and after November 19, 2001—Missouri Public Service 10 MPSC 3d 120.

The Commission approved a settlement agreement and release that resolved pending litigation in cases relating to a gas company's actual cost adjustment for five separate years—Associated Natural Gas 10 MPSC 3d 588.

The Commission permitted Company to seek an unscheduled rate adjustment and granted an interim rate increase to reflect the unexpected and severe natural gas price spike because Company was required to pay significantly greater prices in order to obtain gas—Missouri Gas Energy 10 MPSC 3d 97.

The Commission approved a gas company's request for a waiver from the terms of its tariff to permit it to make a second unscheduled winter purchased gas adjustment in order to reduce its retail gas rates—Laclede Gas Company 10 MPSC 3d 98.

§17.2. Purchased Gas-incentive mechanism

The Commission approved a one-year extension of the experimental Price Stabilization Plan, with certain modifications. The modifications included shortening the 90-day window or procurement period to 60 days, and increasing the amount of Laclede's contribution of its own funds to the Price Stabilization Plan from \$4 million to \$8 million—Laclede Gas Company 10 MPSC 3d 79.

Laclede's Gas Supply Incentive Plan allowed to expire after Commission determined that the GSIP did not properly balance ratepayer and shareholder interests—Laclede Gas Company 10 MPSC 3d 485.

§18. Rates

The Commission issued its order approving a stipulation which agreed that the proposed tariff sheet extending AmerenUE's Gas Supply Incentive Plan should be approved and AmerenUE filed a compliance tariff the same day, which was approved—Union Electric Company 10 MPSC 3d 287.

The \$8,847,088 revenue increase granted Missouri Gas Energy in the Commission's Report and Order issued January 22, 1997, and its subsequent orders, must be applied to the customer classes as an equal percentage increase (i.e., 68.22 percent for Residential; 0.01 percent for Un-metered Gas Lights; 21.22 percent for Small General Service; 2.65 percent for Large General Service; and 7.90 percent for Large Volume Service)—Missouri Gas Energy 10 MPSC 3d 1.

The Commission rejected the tariff sheets filed by Laclede Gas Company which were designed to produce an annual increase of approximately 6.1 percent (\$30.5 million) in charges for gas service—Laclede Gas Company 10 MPSC 3d 361.

The Commission approved the parties' stipulation and agreement. The Commission allowed Atmos to recalculate customer bills and give customer credits to resolve concerns regarding alleged billing errors—Atmos Energy Corporation 10 MPSC 3d 336.

The Commission approved a stipulation and agreement that permitted Missouri Gas Energy to increase its gross annual revenue by approximately 9.9 million dollars—Missouri Gas Energy 10 MPSC 3d 369.

§21. Service

Tariff sheets filed in this matter took into account agreed changes in Laclede's General Terms and Conditions of provision of service and Purchased Gas Adjustment and Actual Cost Adjustment clauses. These changes reflected the Commissions recent emergency amendment to the Cold Weather Rule, allowed Laclede flexibility to install advanced technology/remote reading metering, implemented a \$36 service initiation fee in four \$9 installments for new service connection that require company personnel to go to a particular address, eliminated references in the Purchased Gas Adjustment/Actual Cost Adjustment clauses to capacity release revenues, incorporated tariff provision relating to pricing for gas used in off-system sales, and expanded the seasonal commercial and industrial air conditioning rate schedule to include seasonal sales for on-site power generation customers—Laclede Gas Company 10 MPSC 3d 595.

§22. Weatherization

The Commission re-opened this proceeding for the limited purpose of directing the disposition of the excess funds collected during AmerenUE's pilot weatherization program, and ordered AmerenUE to pay such excess funds to social service agencies to fund additional weatherization work—Union Electric Company 10 MPSC 3d 348.

§27. Depreciation

The Commission found that Laclede Gas Company had not committed to removing its natural gas holders, that the company had already recovered its capital investment in the natural gas holders, and that there was no interim net salvage value of the natural gas holders. Therefore, the Commission determined that it was not just and reasonable for current customers of the company to pay for the expense of removal when the ratepayers may receive no benefit from those payments—Laclede Gas Company 10 MPSC 3d 361.

The Commission found that Laclede Gas Company failed to show that its depreciation calculation, with regard to net salvage was just and reasonable—Laclede Gas Company 10 MPSC 3d 361.

§29. Costs and expenses

The Commission allowed Atmos not to calculate interest on the portion of its Deferred Carrying Cost Balance related to the total amount of the customer credits made to resolve the billing dispute. To the extent that the agreement conflicts with Atmos' tariffs, the Commission authorized a one-time, limited variance from the tariffs—Atmos Energy Corporation 10 MPSC 3d 336.

The Commission allowed Atmos not to try to recover expenses incurred to correct alleged past billing errors. Atmos, however, may try to recover expenses incurred to prevent future billing errors—Atmos Energy Corporation 10 MPSC 3d 336.

The Commission established this case to investigate the process for the recovery of natural gas commodity cost increases by local distribution companies from their customers. The Commission received applications to serve on the task force from numerous entities and individuals. The Commission allowed each entity to have one task force member, and each individual requesting to participate was also made a task force member—Natural Gas Commodity Price Task Force 10 MPSC 3d 147.

§30. Reports, records and statements

The Commission approved a stipulation and agreement that established a procedure for a gas company to use to estimate customer natural gas usage in situations where it is unable to obtain actual meter readings—Union Electric Company 10 MPSC 3d 593.

§31. Interstate operation

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company, now known as Atmos Energy Corporation, to continue its meter sampling program for testing and replacement of meter equipment until December 31, 2001—Associated Natural Gas 10 MPSC 3d 206.

§33. Billing practices

The Commission found an emergency amendment to the Cold Weather Rule was necessary because an extraordinary number of households were without gas service or in danger of losing service, and the average amount of arrearage was also extraordinarily high—Cold Weather Rule 10 MPSC 3d 559.

The Commission re-opened this proceeding for the limited purpose of directing the disposition of the excess funds collected during AmerenUE's pilot weatherization program, and ordered AmerenUE to pay such excess funds to social service agencies to fund additional weatherization work—Union Electric Company 10 MPSC 3d 348.

§34. Accounting Authority orders

The Commission determined that the costs associated with Missouri Gas Energy's modified Safety Line Replacement Program are eligible for deferral under any Accounting Authority Order granted by the Commission to Missouri Gas Energy, including the Accounting Authority Order granted in Case No. GR-2001-292—Missouri Gas Energy 10 MPSC 3d 494.

Based on a stipulation and agreement of the parties, the Commission granted Missouri Gas Energy an accounting authority order for its Safety Line Replacement Program costs, beginning on July 1, 2001—Missouri Gas Energy 10 MPSC 3d 369.

§35. Safety

The Commission approved a modification of Missouri Gas Energy's Safety Line Replacement Program that included a new long-term replacement program for cast iron mains, and affected the replacement of copper service lines—Missouri Gas Energy 10 MPSC 3d 494.

V. JOINT OPERATIONS**§37. Division of revenue**

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas Western Gas Company, now known as Atmos Energy Corporation, to continue its meter sampling program for testing and replacement of meter equipment until December 31, 2001—Associated Natural Gas 10 MPSC 3d 206.

§41. Pipelines

The Commission granted a waiver to Missouri Public Service from Commission rules 4 CSR 240 40-030(11)(B)5 and 4 CSR 240 40-030(12)(M)1.B, which require the company to pressure test a segment of gas pipeline before increasing the operating pressure above its rated Maximum Allowable Operating Pressure—UtiliCorp United 10 MPSC 3d 367.

VI. PARTICULAR KIND OF EXPENSES**§46. Appraisal expense**

The Commission granted a variance of Commission rule 4 CSR 240-10.030(19), allowing Associated Natural Gas, a division of Arkansas

Western Gas Company, now known as Atmos Energy Corporation, to continue its meter sampling program for testing and replacement of meter equipment until December 31, 2001—Associated Natural Gas 10 MPSC 3d 206.

§85. Uncollectible accounts

The Commission suspended tariffs filed by Laclede Gas Company, Missouri Gas Energy, a division of Southern Union Company, Atmos Energy Corporation d/b/a United Cities Gas Company and Greeley Gas Company, and Missouri Public Service and St. Joseph Light and Power, divisions of UtiliCorp United Inc. designed to recover a portion of each applicant's uncollectibles expense through its Purchased Gas Adjustment process—Missouri Natural Gas Distribution Companies 10 MPSC 3d 551.

MANUFACTURED HOUSING

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the manufacturers and dealers**
- §3. Jurisdiction and powers of Federal authorities**
- §4. Jurisdiction and powers of the State Commission**
- §5. Reports, records and statements**

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- §6. When a permit is required generally**
- §7. Operations and construction**

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- §8. Grant or refusal generally**
- §9. Restrictions or conditions**
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IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

- §12. Operations under the permit generally**
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- §14. Modification and amendment of the permit generally**
- §15. Transfer, mortgage or lease generally**
- §16. Revocation, cancellation and forfeiture generally**

§17. Acts or omissions justifying revocation or forfeiture
§18. Necessity of action by the Commission
§19. Penalties

MANUFACTURED HOUSING

I. IN GENERAL

§ 1. Generally

The Commission set aside a previous default order against Wightman. The Commission may set aside a default order for good cause. The Commission found good cause because Wightman attempted to respond timely and because Wightman claims to have corrected the problems about which the Director complains—PSC Staff v. Wightman Enterprises 10 MPSC 3d 547.

The Commission ruled that the Director was entitled to a default order. Commission Rule 4 CSR 240-2.070(9) gives a respondent thirty days to respond to a complaint. Wightman failed to respond within the thirty days—PSC Staff v. Wightman Enterprises 10 MPSC 3d 461.

The Director of the Division of Manufactured Homes and Modular Units of the Missouri Public Service Commission filed a complaint against Discount for altering a manufactured home to which a seal had been affixed and for failing to correct a code violation within 90 days after being ordered to do so by the Commission. Discount admitted to the violation and the parties settled—PSC Staff v. Discount Manufacturing Housing, Inc. 10 MPSC 3d 426.

§ 2. Obligation of the manufacturers and dealers

The Director of the Division of Manufactured Homes and Modular Units of the Missouri Public Service Commission filed a complaint against Discount for altering a manufactured home to which a seal had been affixed and for failing to correct a code violation within 90 days after being ordered to do so by the Commission. Discount admitted to the violation and the parties settled—PSC Staff v. Discount Manufacturing Housing, Inc. 10 MPSC 3d 426.

§ 4. Jurisdiction and powers of the State Commission

The Director of the Division of Manufactured Homes and Modular Units of the Missouri Public Service Commission filed a complaint against Discount for altering a manufactured home to which a seal had been

affixed and for failing to correct a code violation within 90 days after being ordered to do so by the Commission. Discount admitted to the violation and the parties settled—PSC Staff v. Discount Manufacturing Housing, Inc. 10 MPSC 3d 426.

IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

§12. Operations under the permit generally

The Director of the Division of Manufactured Homes and Modular Units of the Missouri Public Service Commission filed a complaint against Discount for altering a manufactured home to which a seal had been affixed and for failing to correct a code violation within 90 days after being ordered to do so by the Commission. Discount admitted to the violation and the parties settled—PSC Staff v. Discount Manufacturing Housing, Inc. 10 MPSC 3d 426.

§18. Necessity of action by the Commission

The Director of the Division of Manufactured Homes and Modular Units of the Missouri Public Service Commission filed a complaint against Discount for altering a manufactured home to which a seal had been affixed and for failing to correct a code violation within 90 days after being ordered to do so by the Commission. Discount admitted to the violation and the parties settled—PSC Staff v. Discount Manufacturing Housing, Inc. 10 MPSC 3d 426.

§19. Penalties

The Director of the Division of Manufactured Homes and Modular Units of the Missouri Public Service Commission filed a complaint against Discount for altering a manufactured home to which a seal had been affixed and for failing to correct a code violation within 90 days after being ordered to do so by the Commission. Discount admitted to the violation and the parties settled—PSC Staff v. Discount Manufacturing Housing, Inc. 10 MPSC 3d 426.

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- §5. Obligation of the utility**

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- §23. Particular organizations generally
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- §31. Trustees

PUBLIC UTILITIES

No cases in this volume involved the question of public utilities.

RATES

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- §1. Jurisdiction and powers generally
- §2. Jurisdiction and powers of Federal Commissions
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- §6. Limitations on jurisdiction and power
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- §8. Reasonableness generally
- §9. Right of utility to accept less than a reasonable rate
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- §14. Temporary or emergency
- §15. Classification of customers
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- §62. Initiation of rates and rate changes
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RATES

I. JURISDICTION AND POWERS

§3. Jurisdiction and powers of the State Commission

Ozark filed a tariff that made permanent an interim increase in intrastate access carrier common line rates under previous Commission orders. The Staff audited Ozark, finding its rates and charges unreasonable. The Commission ordered that Ozark's tariff be modified, making its rates and charges reasonable and reducing its annual revenue—PSC Staff v. Ozark Telephone 10 MPSC 3d 412.

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

§8. Reasonableness generally

The Wireless Termination Tariffs proposed by several small ILECs, all of which were subject to traditional rate-of-return regulation, nonetheless did not violate the rule against single-factor ratemaking because they introduced a new service—Mark Twain Rural Telephone 10 MPSC 3d 29.

The rule against single-factor ratemaking applies to the Commission's review of the exchange access rates of telephone cooperatives in the same way that it applies to telephone corporations subject to rate-of-return ratemaking—Mark Twain Rural Telephone 10 MPSC 3d 29.

Ozark filed a tariff that made permanent an interim increase in intrastate access carrier common line rates under previous Commission orders. The Staff audited Ozark, finding its rates and charges unreasonable. The Commission ordered that Ozark's tariff be modified, making its rates and charges reasonable and reducing its annual revenue—PSC Staff v. Ozark Telephone 10 MPSC 3d 412.

§14. Temporary or emergency

Ozark filed a tariff that made permanent an interim increase in intrastate access carrier common line rates under previous Commission orders. The Staff audited Ozark, finding its rates and charges unreasonable. The Commission ordered that Ozark's tariff be modified, making its rates and charges reasonable and reducing its annual revenue—PSC Staff v. Ozark Telephone 10 MPSC 3d 412.

§15. Classification of customers

The Commission approved a stipulation and agreement that directed Missouri Gas Energy, the Staff of the Commission, and any other interested parties to develop an experimental low-income rate, to be filed with the Commission no later than October 1, 2001—Missouri Gas Energy 10 MPSC 3d 369.

The Commission denied large industrial customers discounted rates previously available to them. Those customers could earn discounts from curtailing their usage. AmerenUE asked the Commission to approve of discounted rates similar to the prior rates. The Commission refused, stating it would not be in the public interest to do so—Union Electric Company 10 MPSC 3d 388.

§21. Discrimination, partiality, or unfairness

The Commission rejected The Office of Public Counsel's argument that a company that files a tariff for less than the entire company has committed discrimination. The Commission finds that Section 393.130 prohibits only "undue" discrimination; a company may legally charge customers differently due to the costs involved in serving them—Missouri Public Service 10 MPSC 3d 510.

§25. Former rates; extent of change

The Commission rejected the request of the large industrial customers to change their rates back to the previous rates. While the change would benefit the customers, it would not be in the public interest—Union Electric Company 10 MPSC 3d 388.

§28. Large consumption

Pursuant to an agreement in an earlier case, Union Electric Company d/b/a AmerenUE discontinued an electricity rate that allowed large industrial customers a discount if they curtailed usage as required. The company later discontinued the rate, and three customers requested that the Commission require the company to implement the customers'

proposal reinstated a discounted rate that was very similar to the discontinued rate. The Commission denied the request, finding that to grant the customers’ request would not be in the public interest—Union Electric Company 10 MPSC 3d 388.

§37. Refund and/or reduction

The Commission approved a credit sharing in the amount of \$28,000,000, to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan, upon finding that the proposed sharing credit amount is reasonable—Union Electric Company 10 MPSC 3d 211.

§42. Seasonal or irregular use

The Commission rejected the customers’ request to allow the customers to designate a portion of their load as curtailable, and thereby receive a discount. These customers could receive a discount under the current tariffs by using the curtailment riders—Union Electric Company 10 MPSC 3d 388.

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

§62. Initiation of rate and rate changes

When the Commission determines the appropriateness of a proposed rate it must consider all relevant factors, rather than just a single factor—UtiliCorp United 10 MPSC 3d 222.

A utility’s tariff that would have changed various fixed customer charges outside the context of a general rate case was rejected as single-issue ratemaking—UtiliCorp United 10 MPSC 3d 222.

When the Commission determines the appropriateness of a proposed rate it must consider all relevant factors, rather than just a single factor—UtiliCorp United 10 MPSC 3d 232.

A utility’s tariff that would have changed various fixed customer charges outside the context of a general rate case was rejected as single-issue ratemaking—UtiliCorp United 10 MPSC 3d 232.

When the Commission determines the appropriateness of a proposed rate it must consider all relevant factors, rather than just a single factor—UtiliCorp United 10 MPSC 3d 227.

A utility's tariff that would have changed various fixed customer charges outside the context of a general rate case was rejected as single-issue ratemaking—UtiliCorp United 10 MPSC 3d 227.

§65. Refunds

The Commission approved a credit sharing in the amount of \$28,000,000, to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan, upon finding that the proposed sharing credit amount is reasonable—Union Electric Company 10 MPSC 3d 211.

§69. Approval or rejection by the Commission

A letter sent by the Commission to a utility indicating that the Commission did not intend to act to suspend a tariff before its effective date was not an approval of the tariff, and did not preclude the Commission from subsequently suspending the tariff—UtiliCorp United 10 MPSC 3d 232.

A letter sent by the Commission to a utility indicating that the Commission did not intend to act to suspend a tariff before its effective date was not an approval of the tariff, and did not preclude the Commission from subsequently suspending the tariff—UtiliCorp United 10 MPSC 3d 222.

A letter sent by the Commission to a utility indicating that the Commission did not intend to act to suspend a tariff before its effective date was not an approval of the tariff, and did not preclude the Commission from subsequently suspending the tariff—UtiliCorp United 10 MPSC 3d 227.

§79. Test or trial rates

The Commission approved a credit sharing in the amount of \$28,000,000, to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan, upon finding that the proposed sharing credit amount is reasonable—Union Electric Company 10 MPSC 3d 211.

V. KINDS AND FORMS OF RATES AND CHARGES

§81. Surcharges

The Commission ordered the surcharge per access line to be reduced from thirteen cents to nine cents. The balance of the surcharge account was large enough to fund the statewide dual-party telephone relay service after reducing the surcharge—Dual Party Relay 10 MPSC 3d 122.

VI. RATES AND CHARGES OF PARTICULAR UTILITIES**§104. Electric and power**

The Commission approved a credit sharing in the amount of \$28,000,000, to be distributed to AmerenUE customers as a result of the second sharing period of its Experimental Alternative Regulation Plan, upon finding that the proposed sharing credit amount is reasonable—Union Electric Company 10 MPSC 3d 211.

§108. Gas

The Commission issued its order approving a stipulation which agreed that the proposed tariff sheet extending AmerenUE's Gas Supply Incentive Plan should be approved and AmerenUE filed a compliance tariff the same day, which was approved—Union Electric Company 10 MPSC 3d 287.

§110. Telecommunications

Intrastate access carrier common line rates under previous Commission orders. The Staff audited Ozark, finding its rates and charges unreasonable. The Commission ordered that Ozark's tariff be modified, making its rates and charges reasonable and reducing its annual revenue—PSC Staff v. Ozark Telephone 10 MPSC 3d 412.

The Commission approved a non-unanimous stipulation and agreement that authorized Oregon Farmers Mutual Telephone Company to file tariff sheets to establish per minute access rates for originating carrier common line service of \$0.039078 and for terminating carrier common line service of \$0.069161—Oregon Farmers Mutual Telephone 10 MPSC 3d 220.

Company's proposed Wireless Termination Tariff introduced a new service because it applied to different traffic than the Company's existing Radio Common Carrier Interconnection Service Tariff—Mark Twain Rural Telephone 10 MPSC 3d 29.

The Commission found that the company had a revenue deficiency of \$666,461, and authorized the company to implement a rate design that assigned \$61,375 to terminating cellular traffic and raised access rates by \$420,498, keeping parity between interLATA and intraLATA access rates and keeping the current originating Carrier Common Line rates versus terminating Carrier Common Line rates ratio. The Commission noted that the company may raise local rates as it finds appropriate in order to capture the balance of the revenue requirement, \$184,588—Northeast Missouri Rural Telephone Company 10 MPSC 3d 275.

VII. EMERGENCY AND TEMPORARY RATES

§117. Burden of proof to show emergencies

With a pending rate case before the Commission, the request for immediate, interim rate relief must be supported by a showing of negative returns in the period before the rate case is concluded, a showing that there is a risk that the ability to provide safe and adequate service will be impaired or a showing of an inability to finance the operations of the company—Empire District Electric 10 MPSC 3d 124.

VIII. RATE DESIGN, CLASS COST OF SERVICE

§118. Method of allocating costs

Because the Commission concluded that transactional costs associated with a merger/acquisition were non-recurring, such costs were inappropriate for inclusion in rate design. The Commission traditionally, and properly, allows recovery of cost increases that are projected to occur after the end of the test year only if those costs are certain to occur and able to be determined with reasonable precision—St. Louis County Water Company 10 MPSC 3d 255.

SECURITY ISSUES

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- §63. Sale price and interest rates generally
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SECURITY ISSUES

No cases in this volume involved the question of security issues.

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SERVICE

III. DUTY TO SERVE

- §18. Duty to render adequate service

The Commission closed a case established to investigate water quality in one of Company’s seven, non-contiguous districts, where the record showed that water quality was affected only with respect to certain esthetic factors, that Company had taken reasonable steps to ameliorate these conditions, and that no party sought a hearing—Missouri-American Water Company 10 MPSC 3d 94.

VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT

- §46. Connections, instruments and equipment in general

The Commission approved the Joint Sponsors’ Model, which covered caged physical, shared, cageless, adjacent on-site, adjacent off-site and virtual collocation—Southwestern Bell Telephone Company 10 MPSC 3d 351.

SEWER

I. IN GENERAL

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the Federal Commissions
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of local authorities
- §9. Territorial agreements

III. OPERATIONS

- §10. Operation generally
 - §11. Construction and equipment
 - §12. Maintenance
 - §13. Additions and betterments
 - §14. Rates and revenues
 - §15. Return
 - §16. Costs and expenses
 - §17. Service
 - §18. Depreciation
 - §19. Discrimination
 - §20. Apportionment
 - §21. Accounting
 - §22. Valuation
 - §23. Extensions
 - §24. Abandonment or discontinuance
 - §25. Reports, records and statements
 - §26. Financing practices
 - §27. Security issues
 - §28. Rules and regulations
 - §29. Billing practices
 - §30. Eminent domain
 - §31. Accounting Authority orders
-

SEWER

I. IN GENERAL

§2. Certificate of convenience and necessity

The Commission granted Ozark Shores Water Company's application to cancel the certificate of public convenience and necessity for water and sewer service and the sewer service tariff of Summerhaven Condominiums. Due to the mutual termination of an asset sale agreement, Ozark Shores Water did not acquire the properties involving the water and sewer systems as previously anticipated, and has no right to own, operate, manage or control those systems—Ozark Shores Water Company 10 MPSC 3d 497.

III. OPERATIONS

§14. Rate and revenues

The Commission approved rates on an interim basis, pending Terre Du Lac's compliance with agreements addressing safety and adequacy of services and just and reasonable delivery of services—Terre Du Lac Utilities 10 MPSC 3d 111.

Since all parties agree that there are no contested issues and that Osage should receive the revenue increase, and since no party objects to the tariffs that implement the increase, the Commission approved the tariff—Osage Water Company 10 MPSC 3d 208.

STEAM

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

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- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
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- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
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- §39. Costs and expenses
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- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
 - §47. Physical connection
 - §48. Contracts
 - §49. Records and statements
-

STEAM

No cases in this volume involved the question of steam.

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I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §3.1. Certificate of local exchange service authority
- §3.2. Certificate of interexchange service authority
- §3.3. Certificate of basic local exchange service authority
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers of local authorities
- §6. Jurisdiction and powers of Federal Commissions
- §7. Jurisdiction and powers of the State Commission

III. OPERATIONS

- §8. Operations generally
- §9. Public corporations
- §10. Abandonment or discontinuance
- §11. Depreciation
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- §13. Costs and expenses
- §13.1. Yellow Pages
- §14. Rates
- §15. Establishment of a rate base
- §16. Revenue
- §17. Valuation
- §18. Accounting
- §19. Financing practices
- §20. Return

TELECOMMUNICATIONS

- §21. Construction
- §22. Maintenance
- §23. Rules and regulations
- §24. Equipment
- §25. Additions and betterments
- §26. Service generally
- §27. Invasion of adjacent service area
- §28. Extensions
- §29. Local service
- §30. Calling scope
- §31. Long distance service
- §32. Reports, records and statements
- §33. Billing practices
- §34. Pricing policies
- §35. Accounting Authority orders

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §36. Relations between connecting companies generally
- §37. Physical connection
- §38. Contracts
- §39. Division of revenue, expenses, etc.

V. ALTERNATIVE REGULATION AND COMPETITION

- §40. Classification of company or service as noncompetitive, transitionally , or competitive
- §41. Incentive regulation plans
- §42. Rate bands
- §43. Waiver of statutes and rules
- §44. Network modernization
- §45. Local exchange competition
- §46. Interconnection Agreements
- §46.1 Interconnection Agreements-Arbitrated

TELECOMMUNICATIONS

I. IN GENERAL

§1. Generally

The Commission directed Southwestern Bell Telephone Company to include Missouri data within the scope of the audit that has been ordered in the state of Texas—Southwestern Bell Telephone Company 10 MPSC 3d 409.

The Commission denied the motion to stay the proceeding and establish time for an additional comment cycle because the Commission had held an on-the-record conference where it heard comments of the parties and the Commission had accepted written comments—Southwestern Bell Telephone Company 10 MPSC 3d 69.

The Commission found that the Missouri 271 Interconnection Agreement (M2A) offered by Southwestern Bell Telephone Company did not meet the requirements of the “competitive checklist” as contained in Section 271(2)(B) of the Telecommunications Act of 1996—Southwestern Bell Telephone Company 10 MPSC 3d 73.

The Commission determined that if Southwestern Bell Telephone Company modified its Missouri 271 Interconnection Agreement (M2A) as outlined in the interim order, no additional testing time would be required. Thus, the Commission found that under those circumstances it could find that the M2A met the requirements of Section 271(2)(B) of the Telecommunications Act of 1996 and it could make a conditional recommendation to the Federal Communications Commission regarding Southwestern Bell Telephone Company’s intraLATA application—Southwestern Bell Telephone Company 10 MPSC 3d 73.

The Commission denied the motions to reconsider the Commission’s recommendation to the Federal Communications Commission (FCC) and designated the case as “open” for an indefinite period in order to monitor Southwestern Bell Telephone Company’s performance under the Missouri 271 Interconnection Agreements (M2A) and the Performance Remedy Plan—Southwestern Bell Telephone Company 10 MPSC 3d 432.

The Commission found that Southwestern Bell Telephone Company’s entry into the long distance market in Missouri is in the public interest—Southwestern Bell Telephone Company 10 MPSC 3d 150.

The Commission determined that even though the voluntary price reductions made to the Missouri 271 Interconnection Agreements (M2A) were not further reduced to the levels that Southwestern Bell Telephone Company’s customers in the states of Arkansas and Kansas received, there was no new issue with regard to the pricing of unbundled network elements that would cause the Commission to reconsider its previous recommendation to the Federal Communications Commission—Southwestern Bell Telephone Company 10 MPSC 3d 432.

The Commission found that prices set in Case No. TO-98-40 were found in that case to be TELRIC compliant, and that lowering those rates could

not logically be considered discriminatory to the competitive telecommunications companies in the current case—Southwestern Bell Telephone Company 10 MPSC 3d 432.

The Commission found that the M2A offered by Southwestern Bell Telephone Company met the requirements of 47 U.S.C. § 271(c)—Southwestern Bell Telephone Company 10 MPSC 3d 150.

The Commission found that any interconnection agreement adopted by a carrier and filed with the Commission with substantially the same terms and conditions as the M2A shall be deemed approved by the Commission when filed—Southwestern Bell Telephone Company 10 MPSC 3d 150.

The Commission supported Southwestern Bell Telephone Company's application for authority to provide in-region interLATA telecommunications service within Missouri—Southwestern Bell Telephone Company 10 MPSC 3d 150.

The Commission found that Southwestern Bell Telephone Company met the requirements in Missouri of the 14-point competitive checklist of 47 U.S.C. § (c)(2)(B)—Southwestern Bell Telephone Company 10 MPSC 3d 150.

The Commission found that Southwestern Bell Telephone Company's Missouri 271 Interconnection Agreement (M2A) as revised, met the requirements of the 47 U.S.C. §271(c). The Commission directed that the M2A be made available to competitive local exchange companies—Southwestern Bell Telephone Company 10 MPSC 3d 117.

The Commission supported Southwestern Bell Telephone Company's application with the Federal Telecommunications Commission for authority to provide in-region interLATA telecommunications service within Missouri—Southwestern Bell Telephone Company 10 MPSC 3d 117.

The Commission rejected the company's proposed tariff sheet that was designed to (1) eliminate the "interim, subject to refund" provision in the company's tariff, and (2) institute a general rate increase. However, the Commission determined that the company was not required to refund any of the revenue collected from the interim revenue-neutrality Carrier Common Line surcharge element and authorized the company to incorporate the interim revenue-neutrality Carrier Common Line surcharge into the company's rate structure. The Commission also found that the company did have a revenue deficiency of \$666,461. The order authorized the company to implement a rate design that raised access rates by \$420,498 and assigned \$61,375 to terminating cellular traffic.

The Commission noted that the company may raise local rates as it finds appropriate in order to capture the balance of the revenue requirement, \$184,588—Northeast Missouri Rural Telephone Company 10 MPSC 3d 275.

§2. Obligation of the utility

The Commission ordered implementation of a statewide dual-party telephone relay service in Case TO-90-174 for deaf, hearing impaired and speech impaired customers—Dual Party Relay 10 MPSC 3d 122.

Traffic-blocking provision in proposed Wireless Termination Tariffs was permissible in that it amounted to no more than a request that Southwestern Bell enforce the provisions of its own tariff—Mark Twain Rural Telephone 10 MPSC 3d 29.

§3.2. Certificate of interexchange service authority

The Commission granted a certificate of service authority to provide intrastate interexchange telecommunications services in the state of Missouri to Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance and Southwestern Bell Communications Services Inc. d/b/a SBC Long Distance—Southwestern Bell Communication Services 10 MPSC 3d 569.

§4. Transfer, lease and sale

The Commission approved the transfer of all of the stock in Claricom Networks, Inc., a Delaware based telecommunications company doing business in the state of Missouri, and regulated by the Commission. The purchasers were Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC, who are all Delaware corporations, but are not telecommunications companies, are not regulated by the Commission, and do not do business in the state of Missouri. The Commission concludes that it is in the public interest to approve the transfer and because applicants requested the Commission's approval—Claricom Networks, Inc. 10 MPSC 3d 560.

II. JURISDICTION AND POWERS

§6. Jurisdiction and powers of Federal Commissions

The FCC has plenary authority over the North American Numbering Plan—Area Codes 10 MPSC 3d 237.

The Federal Communications Commission is vested with exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States pursuant to 47 U.S.C. Section 251(e)—Area Codes 10 MPSC 3d 82.

The Federal Communications Commission is vested with exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States pursuant to 47 U.S.C. Section 251(e). The Federal Communications Commission may delegate all or any portion of this authority to state commissions or other entities. Id—Area Codes 10 MPSC 3d 82.

§7. Jurisdiction and powers of the State Commissions

Pursuant to its general jurisdiction under Sections 386.250 and 392.520 of the Revised Statutes of Missouri and pursuant to delegations of authority from the Federal Communications Commission, the Missouri Public Service Commission has jurisdiction and authority to determine the method and implementation of numbering relief for the 314 and 816 area codes, to determine and implement certain numbering conservation methodologies, to review, audit and verify use of numbering resources, and to hear and determine certain requests or disputes related to the use or procurement of numbering resources—Area Codes 10 MPSC 3d 82.

The Commission delays overlay relief for the 314 and 816 area codes until exhaustion of numbering resources is imminent—Area Codes 10 MPSC 3d 500.

The rule against single-factor ratemaking applies to the Commission's review of the exchange access rates of telephone cooperatives in the same way that it applies to telephone corporations subject to rate-of-return ratemaking—Mark Twain Rural Telephone 10 MPSC 3d 29.

Under Section 392.230(3) RSMo, the Commission has the discretionary authority to suspend, for 120 days plus six months, the effective date of a tariff for a new rate, rental, or charge. The Commission finds that, in order to allow more time to study the effect of the proposed tariff, it should be suspended under this statute—AT&T 10 MPSC 3d 440.

The Commission concluded that it had jurisdiction over the Wireless Termination Tariffs proposed by telephone cooperatives because the charges imposed by the proposed tariffs were in the nature of exchange access charges—Mark Twain Rural Telephone 10 MPSC 3d 29.

The Commission denies the Office of Public Counsel's Motion for Correction and Clarification finding Public Counsel's position with respect to numbering relief in the 314 and 816 area codes were not appropriate and were abandoned by the Public Counsel—Area Codes 10 MPSC 3d 549.

The Commission approves state number pooling trials for the 314 and 816 area codes—Area Codes 10 MPSC 3d 503.

III. OPERATIONS

§8. Operations generally

The Commission approves the Numbering Plan Area relief implementation plan for the 816 area code—Area Codes 10 MPSC 3d 82.

The Commission delays overlay relief for the 314 and 816 area codes until exhaustion of numbering resources is imminent—Area Codes 10 MPSC 3d 500.

The Commission approves state number pooling trials for the 314 and 816 area codes—Area Codes 10 MPSC 3d 503.

The Commission ordered that the permissive dialing and mandatory dialing dates for the 314 NPA (557 overlay) shall be extended until January 1, 2002, and to May 5, 2002, respectively. The Commission ordered that the permissive dialing and mandatory dialing dates for the 816 NPA (975 overlay) shall be extended until May 5, 2002, and September 8, 2002, respectively—Area Codes 10 MPSC 3d 237.

The Commission denies the Office of Public Counsel's Motion for Correction and Clarification finding Public Counsel's position with respect to numbering relief in the 314 and 816 area codes were not appropriate and were abandoned by the Public Counsel—Area Codes 10 MPSC 3d 549.

§11. Depreciation

The Commission directed the company to adopt the depreciation rates developed by the Staff of the Commission for use by small telecommunications companies. Staff's recommended depreciation rates recover only the original capital cost of plant and exclude net salvage—Northeast Missouri Rural Telephone Company 10 MPSC 3d 275.

§12. Discrimination

The federal Telecommunications Act of 1996 presents set time frames within which the Commission may resolve issues presented for arbitration. Where the parties have agreed to a settlement, Commission will not delay issuing its arbitration order because of the federal deadline—Fidelity Communication Services III, Inc. 10 MPSC 3d 243.

Under the federal Telecommunications Act of 1996, after an arbitrated interconnection agreement is filed with the Commission, the Commission has only 30 days to act to approve or reject the agreement. The Commission directs that the agreement be submitted to its Staff prior to filing to aid in the Commission's review—Fidelity Communication Services III, Inc. 10 MPSC 3d 243.

§14. Rates

The Commission approved a wireless termination service tariff for Mark Twain Communications Company (a Competitive Local Exchange Carrier, or CLEC), finding that the obligation to negotiate in good faith imposed by the Telecommunications Act of 1996 was an adequate safeguard for any wireless carrier dissatisfied with the provisions of the wireless termination tariff. The Commission also concluded that it would be fundamentally inequitable to allow Independent Local Exchange Carriers to recover termination costs through termination service tariffs, but to deny a CLEC the same opportunity—Mark Twain Communications Company 10 MPSC 3d 541.

The Commission approved a non-unanimous stipulation and agreement that authorized Oregon Farmers Mutual Telephone Company to file tariff sheets to establish per minute access rates for originating carrier common line service of \$0.039078 and for terminating carrier common line service of \$0.069161—Oregon Farmers Mutual Telephone 10 MPSC 3d 220.

Ozark filed a tariff that made permanent an interim increase in intrastate access carrier common line rates under previous Commission orders. The Staff audited Ozark, finding its rates and charges unreasonable. The Commission ordered that Ozark's tariff be modified, making its rates and charges reasonable and reducing its annual revenue—PSC Staff v. Ozark Telephone 10 MPSC 3d 412.

The Commission is mindful that the telephone companies, and their owners, have a constitutional right to a fair and reasonable return upon their investment—Mark Twain Rural Telephone 10 MPSC 3d 29.

The Wireless Termination Tariffs proposed by several small ILECs, all of which were subject to traditional rate-of-return regulation, nonetheless did not violate the rule against single-factor ratemaking because they introduced a new service—Mark Twain Rural Telephone 10 MPSC 3d 29.

The Commission determined it should set rates according to the Joint Sponsors' Model rather than the SBC Model. The Joint Sponsors' Model accounts for all necessary rate elements. It is also self-contained, uses a Microsoft Excel application, and is not confidential. In contrast, the SBC model is not self-contained, is considered highly confidential, has no instruction manual, and does not provide its calculations—Southwestern Bell Telephone Company 10 MPSC 3d 351.

The Commission rejected, as a violation of the price cap by which its rates are regulated, a tariff filed by Southwestern Bell Telephone Company that would have imposed a \$0.24 payphone use charge on alternately billed calls carried by Southwestern Bell that are made from payphones—Southwestern Bell Telephone Company 10 MPSC 3d 420.

§18. Accounting

The Commission approved a stipulation and agreement that required Green Hills Telephone Company to eliminate, effective January 1, 2001, the special annual amortization of \$156,000 implemented in Case No. TM-95-323—Green Hills Telephone Corporation 10 MPSC 3d 204.

§26. Service generally

The Commission approves the Numbering Plan Area relief implementation plan for the 314 area code—Area Codes 10 MPSC 3d 82.

The Commission denies the Office of Public Counsel's Motion for Correction and Clarification finding Public Counsel's position with respect to numbering relief in the 314 and 816 area codes were not appropriate and were abandoned by the Public Counsel—Area Codes 10 MPSC 3d 549.

The Commission delays overlay relief for the 314 and 816 area codes until exhaustion of numbering resources is imminent—Area Codes 10 MPSC 3d 500.

The Commission approves state number pooling trials for the 314 and 816 area codes—Area Codes 10 MPSC 3d 503.

§33. Billing practices

Commission did not impute costs to determine whether calling plan was predatory and anticompetitive and approved local long distance rate plan where service was available for resale and matched a competitor's rates—GTE Midwest 10 MPSC 3d 392.

IV. RELATIONS BETWEEN CONNECTING COMPANIES**§36. Relations between connecting companies generally**

Commission did not impute costs to determine whether calling plan was predatory and anticompetitive and approved local long distance rate plan where service was available for resale and matched a competitor's rates—GTE Midwest 10 MPSC 3d 392.

Although the federal Telecommunications Act of 1996 provides that reciprocal compensation arrangements for local traffic are a mandatory feature of agreements between carriers, including wireless carriers, and LECs, that provision does not apply where, as here, there are no such agreements between the parties. The Act does not state that reciprocal compensation is a necessary component of the tariffs of LECs or ILECs—Mark Twain Rural Telephone 10 MPSC 3d 29.

The pricing standards contained in the federal Telecommunications Act of 1996, and the FCC's implementing regulations, apply to the arbitration of interconnection agreements by the Commission. These standards do not apply where there are no such agreements under arbitration—Mark Twain Rural Telephone 10 MPSC 3d 29.

Southwestern Bell Telephone Company (SWBT) was ordered to make its Local Plus calling plan service available for resale by facility-based carriers that purchase unbundled switching from SWBT, to prevent SWBT from underpricing the service to the detriment of its competition—Southwestern Bell Telephone Company 10 MPSC 3d 245.

Southwestern Bell Telephone Company (SWBT) was ordered to make its Local Plus calling plan service available for resale by facility-based carriers that utilize their own switch, to prevent SWBT from underpricing the service to the detriment of its competition—Southwestern Bell Telephone Company 10 MPSC 3d 245.

The Commission granted Southwestern Bell Telephone Company's motion to lower the rates in the Missouri Interconnection Agreement (M2A)—Southwestern Bell Telephone Company 10 MPSC 3d 429.

§37. Physical connection

The Commission approved the Joint Sponsors' Model, which covered caged physical, shared, cageless, adjacent on-site, adjacent off-site and virtual collocation. The Joint Sponsors' Model accounts for all necessary rate elements. It is also self-contained, uses a Microsoft Excel application, and is not confidential. In contrast, the SBC model is not self-contained, is considered highly confidential, has no instruction manual, and does not provide its calculations—Southwestern Bell Telephone Company 10 MPSC 3d 351.

§39. Division of revenue, expenses, etc.

Southwestern Bell Telephone Company (SWBT) was ordered to pay terminating access to third party LECs when reselling its Local Plus calling plan service to facility-based carriers that purchase unbundled switching from SWBT—Southwestern Bell Telephone Company 10 MPSC 3d 245.

Southwestern Bell Telephone Company was ordered to pay terminating access to third party LECs when reselling its Local Plus calling plan service to facility-based carriers that utilize their own switch—Southwestern Bell Telephone Company 10 MPSC 3d 245.

V. ALTERNATIVE REGULATION AND COMPETITION

§40. Classification of company or service as noncompetitive, transitionally, or competitive

The Commission found that all the interexchange services of Southwestern Bell Communications Services, Inc. were competitive—Southwestern Bell Communication Services 10 MPSC 3d 569.

§43. Waiver of statutes and rules

The Commission found that the waivers that Southwestern Bell Communications Services, Inc. requested were identical to those waivers historically granted to competitive carriers by the Commission. Therefore, the Commission found that it was grant the waivers to Southwestern Bell Communications Services, Inc—Southwestern Bell Communication Services 10 MPSC 3d 569.

§45. Local exchange competition

The Commission approved a wireless termination service tariff for Mark Twain Communications Company (a Competitive Local Exchange Carrier, or CLEC), finding that the obligation to negotiate in good faith

imposed by the Telecommunications Act of 1996 was an adequate safeguard for any wireless carrier dissatisfied with the provisions of the wireless termination tariff. The Commission also concluded that it would be fundamentally inequitable to allow Independent Local Exchange Carriers to recover termination costs through termination service tariffs, but to deny a CLEC the same opportunity—Mark Twain Communications Company 10 MPSC 3d 541.

§46. Inteconnection Agreements

The Commission found that any interconnection agreement adopted by a carrier and filed with the Commission with substantially the same terms and conditions as the M2A shall be deemed approved by the Commission when filed—Southwestern Bell Telephone Company 10 MPSC 3d 150.

§46.1. Interconnection Agreements-Arbitrated

The Commission rejected the Missouri Independent Telephone Group's request to intervene in an arbitrated interconnection agreement. The Commission found that MITG was not a necessary and indispensable party. The Commission has discretion to allow intervention. However, the Commission could not grant intervention and also rule on the arbitrated agreement within the statutory deadline. Section 252(e)(4) requires the Commission to rule on an arbitrated interconnection agreement within thirty days of its filing—AT&T, TCG St. Louis, TCG KC 10 MPSC 3d 455.

The Commission resolved this arbitration by directing the parties, in most cases, to adopt the corresponding provisions of the so-called M2A, a draft interconnection agreement proposed by Southwestern Bell, and approved by the Commission, in conjunction with Bell's Section 271 application—AT&T, TCG St. Louis, Inc. & TCG Kansas City, Inc. 10 MPSC 3d 295.

VALUATION**I. IN GENERAL**

- §1. Generally
- §2. Constitutional limitations
- §3. Necessity for
- §4. Obligation of the utility

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of local authorities

III. METHODS OR THEORIES OF VALUATION

- §9. Methods or theories generally
- §10. Purpose of valuation as a factor
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- §14. For rate making purposes
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- §22. Financing costs
- §23. Intercorporate relationships
- §24. Organization and promotion costs
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- §26. Property not used or useful
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- §28. Direct labor

- §29. Material overheads
- §30. Accidents and damages
- §31. Engineering and superintendence
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- §33. Interest during construction
- §34. Insurance during construction
- §35. Taxes during construction
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- §68. Deprecation generally
- §69. Necessity of deduction for depreciation
- §70. Factors affecting propriety thereof
- §71. Methods of establishing rates or amounts
- §72. Property subject to depreciation
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X. VALUATION OF PARTICULAR UTILITIES

- §74. Electric and power
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VALUATION

No cases in this volume involved the question of valuation.

WATER

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- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale
- §5. Joint Municipal Utility Commissions

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- §6. Jurisdiction and powers generally
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- §8. Jurisdiction and powers of the State Commission
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- §29. Security issues
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- §31. Billing practices
- §32. Accounting Authority orders

WATER

I. IN GENERAL

§2. Certificate of convenience and necessity

The Commission granted a certificate of public convenience and necessity authorizing a public water supply line connecting Applicant’s certificated service areas in Jefferson and St. Louis Counties, Missouri, to the Jefferson County Consolidated Public Water Supply District C-1, permitting Applicant to sell water to the District—St. Louis County Water Company 10 MPSC 3d 355.

The Commission granted Ozark Shores Water Company’s application to cancel the certificate of public convenience and necessity for water and sewer service and the sewer service tariff of Summerhaven Condominiums. Due to the mutual termination of an asset sale agreement, Ozark Shores Water did not acquire the properties involving the water and sewer systems as previously anticipated, and has no right to own, operate, manage or control those systems—Ozark Shores Water Company 10 MPSC 3d 497.

§4. Transfer, lease and sale

The Commission authorized the merger of St. Louis County Water Company d/b/a Missouri-American Water Company and Jefferson City Water Works Company d/b/a Missouri-American Water Company with and into Missouri-American Water Company, approved a stipulation and agreement, and ordered that the parties comply with the conditions set forth in that agreement—Missouri-American Water 10 MPSC 3d 507.

The Commission approved the sale of a small, privately owned water system to a newly created public water supply district after finding that the sale would not be detrimental to the public interest—Davis Water System 10 MPSC 3d 241.

II. JURISDICTION AND POWERS

§8. Jurisdiction and powers of the State Commission

Osage is a public utility engaged in the provision of water service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 2000—Osage Water Company 10 MPSC 3d 213.

A public utility engaged in the provision of water service to the general public in the state of Missouri is subject to the general jurisdiction of the Missouri Public Service Commission—St. Louis County Water Company 10 MPSC 3d 255.

The Commission approved the sale and transfer of assets of a water utility system related to underlying sale of commercial development where new owners agreed to Staff’s conditions and demonstrated ability to operate system. The transfer would not be detrimental to the public interest—Hotel Associates, Inc. 10 MPSC 3d 292.

III. OPERATIONS

§16. Rates and revenues

The Commission approved rates on an interim basis, pending Terre Du Lac’s compliance with agreements addressing safety and adequacy of services and just and reasonable delivery of services—Terre Du Lac Utilities 10 MPSC 3d 111.

The Commission found that Osage Water Company began charging its customers higher rates before it was authorized to do so and ordered Osage to lower its rates to the previously-authorized level for a period of

time in order to make customers whole for the unlawful overcharges—Osage Water Company 10 MPSC 3d 555.

The Commission authorized Osage Water Company to file tariffs that implement an increase in annual water revenues of \$54,303—Osage Water Company 10 MPSC 3d 213.

Osage Water Company filed a motion asking the Commission to modify its November 6 order to allow Osage to calculate the amount of overcharge for each water customer for the months of May, June, and July of 2001, and to credit each account for the overcharge during the months of December 2001, January 2002, and February 2002. The Commission agreed that Osage's proposed method of making customers whole would be more workable than the method the Commission ordered, and allowed Osage to use it—Osage Water Company 10 MPSC 3d 557.

§19. Service

The Commission closed a case established to investigate water quality in one of Company's seven, non-contiguous districts, where the record showed that water quality was affected only with respect to certain esthetic factors, that Company had taken reasonable steps to ameliorate these conditions, and that no party sought a hearing—Missouri-American Water Company 10 MPSC 3d 94.

§20. Depreciation

The Commission's holding that the Company use the whole life method of determining depreciation rates is based on the record in this case, and on the circumstances in which the Company finds itself—St. Louis County Water Company 10 MPSC 3d 255.

§31. Billing practices

The Commission found that Osage Water Company began charging its customers higher rates before it was authorized to do so and ordered Osage to lower its rates to the previously-authorized level for a period of time in order to make customers whole for the unlawful overcharges—Osage Water Company 10 MPSC 3d 555.

Osage Water Company filed a motion asking the Commission to modify its November 6 order to allow Osage to calculate the amount of overcharge for each water customer for the months of May, June, and July of 2001, and to credit each account for the overcharge during the months of December 2001, January 2002, and February 2002. The Commission agreed that Osage's proposed method of making customers whole

would be more workable than the method the Commission ordered, and allowed Osage to use it—Osage Water Company 10 MPSC 3d 557.

§32. Accounting Authority orders

A third, successive Accounting Authority Order was not appropriate where a Company sought to defer infrastructure replacement costs and the record showed that infrastructure replacement would both require large capital investments by the Company and cause sizeable expenses to the Company over a course of several years, because these were not the sort of extraordinary and non-recurring costs that are appropriately deferred under an Accounting Authority Order—St. Louis County Water Company 10 MPSC 3d 56.
